Public Utilities

FORTNIGHTLY

August 3, 1939

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PUBLISHERS

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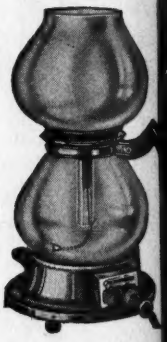
TRADE MARK REG U S PAT. OFF.

At these sensational low prices millions of families can now afford CAFEX Electric Coffee Makers

You know and we know that there is a tremendous mass market for modern vacuum coffee makers as yet untapped. Now with these de luxe CAFEX models at these low prices, we offer you a major load building opportunity. Your "low use" customers by the score can afford these new m Volume sales are assured, so whethe merchandise or not, you will profit b increases through these new C models.

Cafex ALL GLASS ELECTRIC MODEL $3.95



These features mean volume demand:

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3. Pyrex Brand glass.
4. Filtration through cloth held under spring tension.
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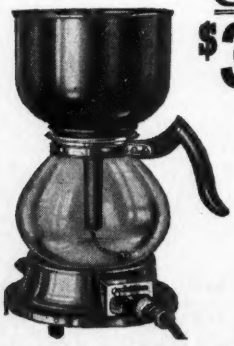

$3.95 ***With New Moldex (special compound) upp bowl . . . almost unbreakable.***

1. Graceful balanced design.
2. Wide Mouth easy to clean lower bowl of Pyrex Bra glass.
3. New two heat stove.
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Cafex

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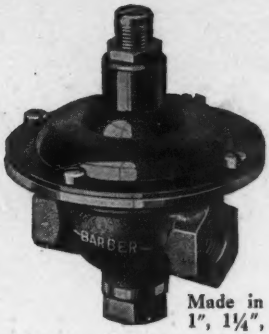
The Hartford Products Co., Dept. P-8, Hartford, Conn.



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Financial Editor—OWEN ELY

Public Utilities Fortnightly

VOLUME XXIV *August 3, 1939* NUMBER 3

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

Publication Office ..... CANDLER BUILDING, BALTIMORE, MD.
Executive, Editorial, and Advertising Offices ..... MUNSEY BUILDING, WASHINGTON, D. C.

PUBLIC UTILITIES FORTNIGHTLY, a magazine dealing with the problems of utility regulation and allied topics, including also decisions of the regulatory commissions and courts, preprinted from *Public Utilities Reports, New Series,* such Reports being supported in part by those conducting public utility service, manufacturers, bankers, accountants, and other users. Entered as second-class matter April 29, 1915, under the Act of March 3, 1879. Entered at the Post Office at Baltimore, Md., Dec. 31, 1936; copyrighted, 1939, by Public Utilities Reports, Inc. Printed in U. S. A.

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Pages with the Editors

WASHINGTON wags have been passing the hot summer days of the drawn-out congressional session with pleasantries over the administration's new spend-lend bill. At this writing the legislation was taking some hard bumps in the congressional hopper. Among other jokes about this latest substitute for the outright contribution of taxpayers' money for public works is the nickname for the bill which was formed by fusing "spending" with "lending," with the result that it is known as the "splending" bill.

THE need for government "splending," we are told by the sponsors of the bill, springs from the inability of business enterprise, particularly small business, to obtain new capital or loans at reasonable rates for promoting business activity. Opponents of the bill have urged that there is no necessity for the Federal government to go into the investment banking business in order to provide employment, since they claim that the timidity of private capital results chiefly from the atmosphere of uncertainty created by New Deal experiments. In other words, if the Federal government would let business alone, private capital would soon come out of its hole.

Steffens-Colmer Studio

JESS P. PASCHALL

The hand that rocks the flash light rules the utility's public relations.

(SEE PAGE 152)

LOUISE C. MANN

Have our good neighbors to the South lost their appetite for North American capital?

(SEE PAGE 143)

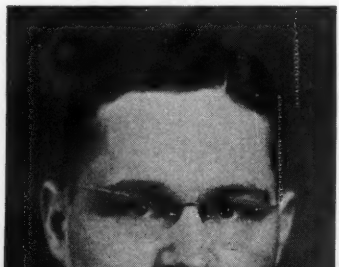
BE that as it may, privately owned utilities have been complaining for several years now about the scarcity of so-called equity capital. And for that matter most industrial lines have been a bit shy on new financing. But it has been the utility industries which have been more under the direct fire of New Deal discipline than other industrial lines. Can it be argued from this that the common stock investor has been scared in direct proportion to the display of government hostility towards the utility industry, as compared with others? Or has the behavior of the utility stock investor been more or less in line with the conduct of stock investors generally?

TOUCHING these questions, in this issue is published an analysis of equity financing for electric utilities which is the joint effort of WILLIAM W. AMOS, a utility analyst for a New York trust company, and JOHN F. CHILDS, who occupies a similar position with the New York investment firm of Dick & Merle-Smith. MR. AMOS was born and raised in New York. After graduating from the College of the City of New York (B. S., '32), he received his business training at the Harvard Graduate School of Business Administration (M.B.A., '34). MR. CHILDS also did postgradu-

ate work at the Harvard Business School following his graduation from Trinity College at Hartford, Conn. (B. S., '31).

WE have been receiving such gratifying response to our foreign utility series, it is with some regret that we publish in this issue the last instalment of the South American series, written by MRS. LOUISE C. MANN. This is an article on the utility situation in Brazil. When last heard from, MRS. MANN was touring the Far East, and it will probably be some time before we can expect the completion of formal articles on utility matters in that troubled quarter of the globe. MRS. MANN is well known in financial circles for her writings and statistical studies in the *New York Journal of Commerce*, the *Boston Transcript*, and in other publications and business periodicals.

AS most utility men are only too well aware, there are a number of different methods for approaching the elusive subject of public relations. There is the geographical approach whereby the problem is broken down into the sphere of local relations, state relations, national and even international relations. There is the political approach, the employee approach, and the Prominent Citizen approach. Probably the most obvious approach of all is the utility company's own domestic meter. Here is the symbol of its physical connection with the ultimate consumer. Here its contact with the public is first made and periodically renewed through the meter reader. And here, says JESS P. PASCHALL (in this issue), in the final analysis, is the making or breaking point of a utility's public relations.



WILLIAM W. AMOS

Companies still able to finance with common shares should do so before prices rise.

(SEE PAGE 131)

JOHN F. CHILDS

There have been only three important examples in the last few years of electric utility common stock distribution.

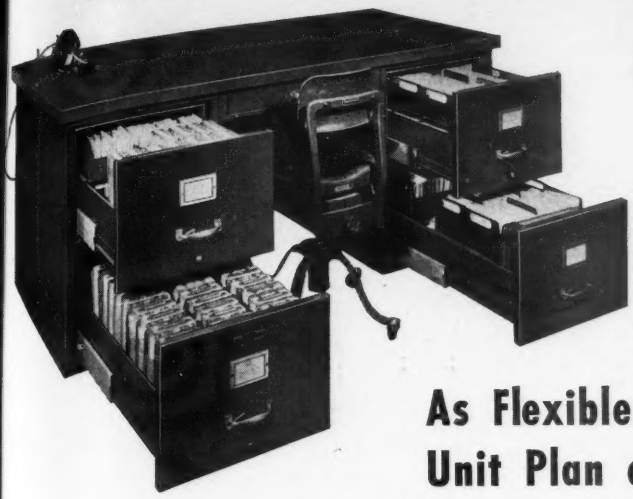
(SEE PAGE 131)

MR. PASCHALL is a Texan who received his early training with the Western Electric branch of the Bell system. In 1917 he went to work for his present employer, the Portland General Electric Company, where he is now a system operator or, as it is called in the trade, a "load dispatcher." His article is enhanced by the authentic flavor of a real dyed-in-the-wool utility employee who knows from personal experience what he is talking about when he speaks of relations with the public by way of the utility company's meter.

IN planning our next issue we were reminded of the fact that beginning August 9th the American Transit Association meets for its annual national convention. This is the fifty-eighth annual conclave of the transit men and from all appearances it is going to be such a big affair that it has to be held in two cities instead of one. Opening in the Biltmore Hotel in Los Angeles for business sessions on August 10th and 11th, the convention will move up to San Francisco on the 13th and reconvene at the Fairmont Hotel for a grand finale on "American Transit Association Day" at the Golden Gate International Exposition on Treasure Island. We are sure that the delegates will find this an enjoyable as well as an instructive experience.

THE next number of this magazine will be out August 17th.

The Editors



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In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 1-64, from 29 P.U.R.(N.S.)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

H. P. LIVERSIDGE
President, Philadelphia Electric Company.

"Good public relations must be earned. They are never a gift from heaven."

THOMAS M. GIRDLER
Chairman, Republic Steel Corporation.

"I regard it [collective bargaining] as essential in the operation of modern industry."

W. J. WILLIAMSON
General Traffic Manager, Sears Roebuck & Co.

"The most outstanding departure from the American system is found in our treatment of transportation."

ELMER L. EBLEN
Roane (Tenn.) County Judge.

"After the bill is amended and TVA gets what it wants it may not be so anxious to look after the homeowner and taxpayers."

LOUIS LUDLOW
U. S. Representative from Indiana.

"American business has led the world in the past because of the absence of restrictions in the way of the spirit of enterprise."

ROBERT A. TAFT
U. S. Senator from Ohio.

"The kind of government activity we have embarked upon cannot be conducted without subordinating state and local self-government."

PERCY S. YOUNG
Chairman of the Executive Committee, Public Service Corporation of New Jersey.

"The market for gas today is secure and I am of the conviction that the field for gas in the home and industry will witness continued expansion."

EDITORIAL STATEMENT
The Atlanta (Ga.) Constitution.

"Day by day the Federal project known as the Tennessee Valley Authority becomes more involved and less understandable to average, reasonable people."

LINUS A. LILLY, S. J.
Regent, School of Law, St. Louis University.

"When we make our indebtedness exceed $40,000,000,000, we must bear in mind that we have to think of interest in terms of billions. If we find it hard to pay taxes that are necessary to meet current expenses when we are using and spending billions of principal, how shall we expect our countrymen of the next generation to bear a greater burden of taxation and pay more interest on money they have neither used nor spent nor seen."

HARRY L. HOPKINS
Secretary, U. S. Department of Commerce.

"Some industries are so important to the public welfare that the government cannot shirk its responsibility by leaving them to struggle with their problems alone."

FLOYD L. CARLISLE
Chairman of the Board, Consolidated Edison Company of New York.

"Even those in Washington who formerly had advised government interference in business now are saying that government should never have been in the business field."

MARRINER S. ECCLES
Chairman of the Board of Governors, Federal Reserve System.

"... I think they [utilities] ought by now to feel fairly well assured that they have a future under private ownership and need not be deterred from needed expansion of their plant."

EDWARD F. BARRETT
President, Long Island Lighting Company.

"Regulation, designed to protect the consumer and the company equally, has been perverted from its rightful and useful purpose and still is being used to punish companies rather than to protect consumers."

JAY FRANKLIN
New Deal columnist.

"The last-minute filibuster against the monetary safety of the United States has reinforced the liberal New Deal argument that Congress is no longer competent to govern this complex, industrial civilization."

ELMER F. ANDREWS
Wage-Hour Administrator.

"If the precedent is established of excluding large numbers of employees without a factual basis merely because of the demand of an employer pressure group, no worker covered by this [wage-hour] act can long expect to receive its benefits."

CHARLES W. KELLOGG
President, Edison Electric Institute.

"The need of our public utilities today is synchronized activity in telling a unified story locally to our customers, with each company preparing information pertinent to the business of supplying electric service in the communities it serves."

JAMES TRUSLOW ADAMS
Writing in Barron's.

"Many institutions which render the highest service to humanity and civilization throughout the entire land are being endangered as part of the price we are paying for an artificially low money rate which has failed to achieve its object of restoring business."

MILLARD E. TYDINGS
U. S. Senator from Maryland.

"Too many people who are employed assume that labor is only a 10, 20, or 30 per cent charge against the income dollar of the business in which they are engaged, and this lack of knowledge puts them in the frame of mind where they become the prey, the tools, and the pawns of those who really exploit them in the name of progress."

No. 18 of a Series

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NECHES POWER PLANT—BEAUMONT, TEXAS

Capacity—320,000 lb. per hr.
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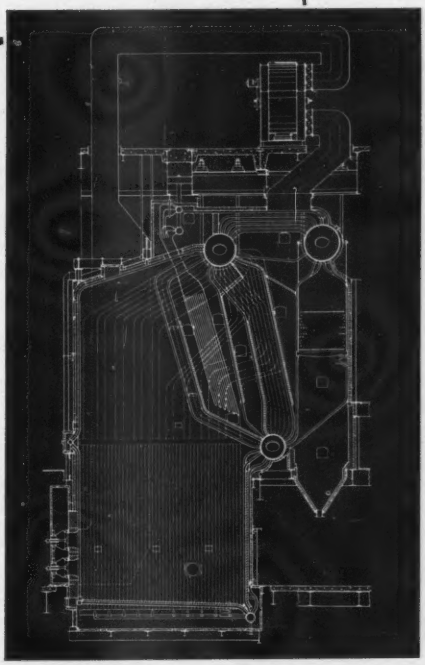
Total Steam Temperature—915 F



The sectional elevation at the right shows a C-E Unit installed in the Neches Power Plant of the Gulf States Utilities company. This unit supplies steam at 850 lb., 900 F, to a 25,000-kw condensing turbine generator. This equipment is operated entirely independently of the existing 360-lb. units.

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The design and construction of this plant extension was under the supervision of Stone and Webster Engineering Corporation.

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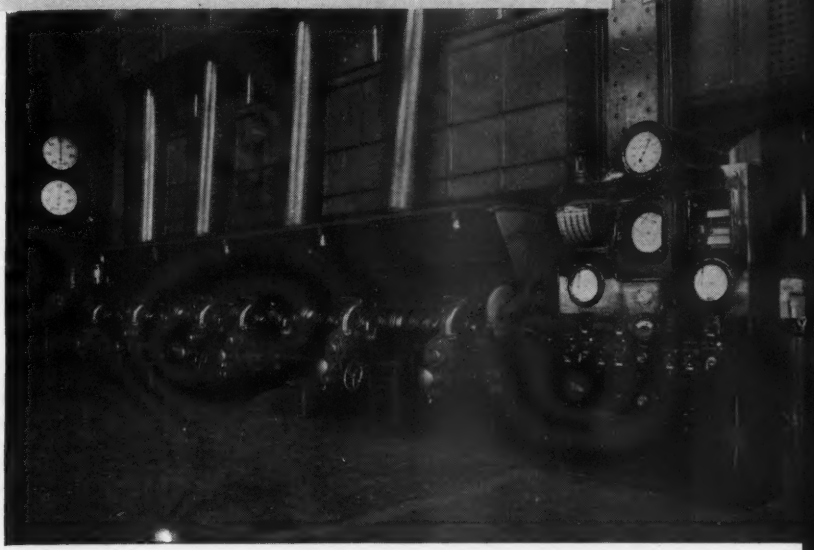

J & L Boiler Tubes keep boilers working efficiently and economically because into every length of J & L seamless tubes is built an extra margin of strength and safety. There are no welds; therefore, there can be no failure at or near a weld — boilers stay on the job longer with fewer costly shut-downs.

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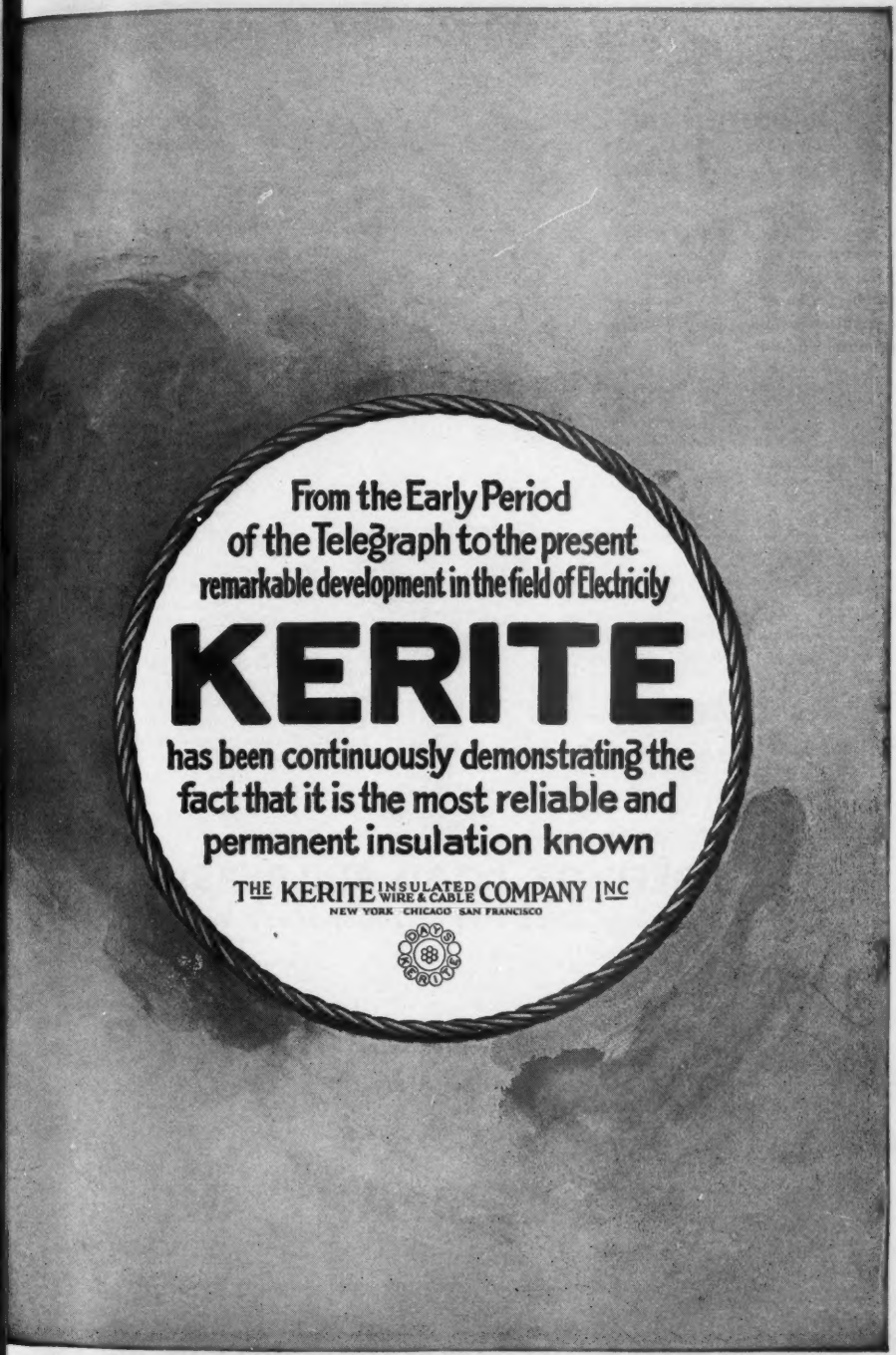

This International 1½-ton Model D-35 Truck is used by the New York City Fire Department as a maintenance truck for its telegraph system.

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Electrical Department

CORCORAN-BROWN LAMP DIVISION

THE ELECTRIC AUTO-LITE COMPANY

4900 Spring Grove Avenue Cincinnati, Ohio

Utilities Almanack

AUGUST

3	Th	¶ *Illuminating Engineering Society will hold annual meeting, San Francisco, Calif., August 21–25, 1939.*
4	F	¶ *Canadian Transit Association starts annual meeting, Vancouver, B. C., 1939.*
5	Sa	¶ *National Association of Railroad and Utilities Commissioners will convene, Seattle, Wash., August 22–24, 1939.*
6	S	¶ *American Water Works Association, Minnesota Section, will hold meeting, Duluth, Minn., August 24, 25, 1939.*
7	M	¶ *Maryland Utilities Association will hold fall convention, Ocean City, Md., August 25, 26, 1939.*
8	Tu	¶ *Pacific Coast Gas Association will hold session, San Francisco, Calif., September 5–7, 1939.*
9	W	¶ *American Transit Association opens annual meeting, San Francisco and Los Angeles, Calif., 1939.*
10	Th	¶ *Rocky Mountain Electrical League will convene, Estes Park, Colo., September 7–9, 1939.*
11	F	¶ *Gas Industry Day will be celebrated, Golden Gate Exposition, San Francisco, Calif., September 9, 1939.*
12	Sa	¶ *Electrochemical Society will hold fall convention, New York, N. Y., September 11–13, 1939.*
13	S	¶ *New England Water Works Association will hold annual convention, Montreal, Canada, September 12–15, 1939.*
14	M	¶ *International Association of Electrical Inspectors starts joint convention of Northwestern and Southwestern Sections, San Francisco, Calif., 1939.*
15	Tu	¶ *National Bus Traffic Association will hold annual meeting, New York, N. Y., September 11, 12, 1939.*
16	W	¶ *Wisconsin Utilities Association, Accounting Section, will hold convention, Milwaukee, Wis., September 21, 22, 1939.*

From an etching by James E. Allen *Courtesy, Kennedy & Co., New York*

Men and Iron

Public Utilities
FORTNIGHTLY

VOL. XXIV; No. 3 AUGUST 3, 1939

Equity Financing for the Electric Utilities

In spite of the threats to which the industry as a whole has been subjected, most companies have only themselves to blame, in the opinion of the authors, for inability to secure money by sale of stocks.

BY JOHN F. CHILDS AND WILLIAM W. AMOS

THE problem of equity financing for the electric power industry arises because the outlook is for a further expansion in demand, and with it the need of funds for additional property. The industry is able to sell bonds on such low interest rates that one is apt to take this as an undeniable indication of a very favorable long-term financial outlook. However, this is not necessarily the case, and the real question of whether the industry will keep its strength depends very largely on its ability to finance, when necessary, with common stock as well as bonds. In this connection it is interesting to note a comment made by C. W. Kellogg, president of the Edison Electric Institute:

> The electric utilities up to now have kept their financial house in order, holding their bonded debt down to about half of their total capitalization. This most desirable condition, which accounts for the high investment standing of our bonds, has been attained and can be maintained only by raising half the new capital by the sale of stocks, preferred and common. The preferred stock in turn is not salable without an adequate margin of security from the sale of common stock. It is clear, therefore, that the common stock money is the one final and necessary foundation that makes the whole structure stand up, ...[1]

[1] An Audit of 1937 Electric Utility Business, as reported in the *Electrical World*, January 15, 1938.

This problem is an important one, not only for the investor, but also for the consumers, the various regulatory bodies, and even for the employees. The present sad plight of the railroads affords a very striking example of what happens when one of the country's major industries falls into financial difficulties.

Up until 1930 investors held the future prospects of the electric power industry in such high esteem that the industry was able to sell common stocks with ease. After 1935, when security prices in general recovered from the effects of the depression sufficiently to make financing again possible, some industrial concerns went into the market for new money by offering capital stocks. Electric power companies, however, have resorted almost entirely to bond financing. It is not easy to condemn the companies for being attracted by the present very low interest rates on bonds, and this tendency of the industry to finance with bonds during the past few years certainly has not as yet been harmful. In fact, the way in which most of the companies have refunded their debt at very low interest rates has greatly reduced the burden of fixed charges. Furthermore, many companies must be commended for including as part of their refunding program serial notes or debentures which will, if they are paid off out of earnings, result in a gradual decrease in funded debt.

A CONSIDERATION of the problem of equity financing by the electric power industry obviously necessitates a broad examination of most of the major factors affecting the industry at the present time. Among these are prospective new money requirements, possible effects of continued bond financing, earnings outlook, and possibilities of equity financing.

In the period from 1923 to 1930 approximately half of the total present plant and property of the electric industry was assembled. In these years of rapid growth, the annual expenditures for construction averaged 830 millions of dollars. The peak year was 1930 when the industry, stimulated by governmental requests for coöperation to stem the tide of depression, went ahead with an ambitious construction program. Expenditures in 1930 amounted to almost one billion dollars. In the ensuing depression years, when the industry was burdened with a large amount of excess capacity, there was considerable criticism of management for overbuilding. Naturally a period of retrenchment accompanied the depression. This was due, not only to the decline in demand, but also to the fact that there was a surplus of capacity. Construction expenditures fell to a low of $129,000,000 in 1933 and remained below $200,000,000 annually until 1936 when they recovered to reach almost $300,000,000. With the increase in sales because of better general business conditions, construction expenditures in 1937 and 1938 approximated $400,000,000 per year.

BECAUSE annual construction expenditures of the electric utilities averaged between 7 and 8 hundred million dollars during the twenties when new customers were being added at a rapid rate and when the industry was expanding generally, such a rate of expenditures has become to be accepted as normal. In an

article in *The Annalist* last year, Mr. Douglas, the then chairman of the Securities and Exchange Commission, said in this connection:

> We are reliably informed that with a revival of business the operating companies should resume their construction programs on a basis approximating the 1923-1930 level of 7 to 8 hundred million dollars annually.[2]

Others have regarded even 7 or 8 hundred million dollars as too low, basing their optimistic estimates of a billion dollars annually on the so-called backlog accumulated as a result of postponements of construction projects during the depression years. However, there can be found no convincing practical proof that such a rate of expenditures is required or will materialize this year, even if 1939 output should exceed the 1937 figure by as much as 10 per cent. In fact, most of the signs indicate a less optimistic figure of about 5 hundred millions. Some of the indications pointing in this direction are as follows:

1. The present and prospective rate of growth and development of the industry should not be expected to be as rapid as it was in the period from 1923 - 1930 when a considerable amount of undeveloped territory was being exploited.

2. Public power projects, such as the TVA, Bonneville, and the Lower Colorado River Authority, have added

[2] *The Annalist*, June 3, 1938, page 747.

TABLE I

POSSIBLE EFFECT OF CONTINUED BOND FINANCING FOR TEN YEARS
(000,000's OMITTED)

	Dec. 31, 1938	*Dec. 31, 1948*** *Assuming $500,000,000 Annual Constr.Exp.*	*Assuming $800,000,000 Annual Constr.Exp.*
Gross property	$12,802*	$16,540	$19,622
Depreciation reserve	1,371	2,628	2,776
Net property	$11,431	$13,912	$16,846
Funded debt	5,700 (assumed)	7,200	10,200
Ratio of funded debt to net property	50%	51.7%	60.8%

* Estimated on basis of net additions since 1932 (less municipal enterprises and allied services).

** Estimating depreciation at 2% annually of net plant and property of which 1% comprises actual retirements and 1% is added to the depreciation reserve each year. Basic figures used in deriving results assuming $500,000,000 annual expenditures are given below (same method followed for $800,000,000 expenditures).

(000,000's omitted) *Date*	*Plant & Prop.*	*Depreciation Reserve*	*Net Property*	*Depreciation Accrual*
Dec. 31, 1938	$12,802	$1,371	$11,431	$228
1939	13,188	1,485	11,703	234
1940	13,571	1,602	11,969	239
1941	13,951	1,721	12,230	245
1942	14,328	1,843	12,485	250
1943	14,703	1,968	12,735	255
1944	15,075	2,095	12,980	260
1945	15,445	2,225	13,220	265
1946	15,812	2,357	13,455	269
1947	16,177	2,491	13,686	274
1948	16,540	2,628	13,912	

new sources of power in various parts of the country, making additional construction by the private utilities in these sections less necessary.

3. Extensive construction programs carried out by many of the large city companies, such as Detroit Edison Company and Consolidated Edison Company, have enabled such companies to maintain safe margins of reserve capacity. Even with these construction programs, the total annual expenditures by the industry did not exceed 450 million dollars in 1937 and 1938. Furthermore, the *Electrical World*[3] and Edison Electric Institute[4] both have estimated the 1939 construction budget for the industry in the neighborhood of between 400 and 500 million dollars.

HAVING thus considered the possible amount of new capital requirements, it is necessary to make some rough estimate of what the effect might be if all requirements were taken care of out of earnings and through the issuance of bonds rather than common stocks. The amount of cash available to the electric power industry for construction purposes from earnings (after common dividends), including depreciation, in 1937 and 1938 can be estimated at about 350 million dollars annually. This checks roughly with comments by Mr. Douglas in connection with the statement mentioned above that if annual construction expenditures averaged 7 to 8 hundred million dollars, "new financing would be required to the extent of 350 to 450 million dollars annually."

In Table I an attempt is made to show the possible effects of financing a 500 million dollar annual construction program and also an 800 million dollar annual program, assuming a present ratio of debt to property of 50 per cent, and also assuming that approximately 350 million dollars per year will be available out of earnings, including depreciation, and that the remainder will be financed through the sale of bonds. In connection with this table, it must be realized that it cannot be considered as any actual forecast, because obviously such figures as the amount of construction that could be taken care of through earnings might be different than has been assumed, and the table is merely an effort to obtain some indication of the relative magnitudes.

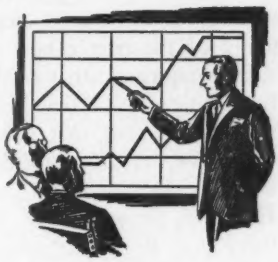
Table I indicates that if the industry attempted to finance annual expenditures of 800 million dollars out of earnings, it would throw capitalization out of balance within ten years by increasing the ratio of debt to property from 50 per cent to 60.8 per cent. In other words, this table establishes the fact that a large-scale construction program cannot safely be financed by the industry out of earnings and the sale of bonds. Under such conditions a market for equity securities would be a virtual necessity if the industry were to meet the demands on its facilities and still avoid the creation of an unsound capital structure.

IT has been pointed out, however, that the possibility of average annual construction expenditures of as much as 800 million dollars appears to be more or less remote at the present time, and that a figure of about 500 million dollars might more closely approximate real annual requirements. The figures in Table I leave little room for doubt that expenditures of 500 million dollars per year could be met with-

[3] *Electrical World*, January 14, 1939.
[4] Edison Electric Institute—Release by C. W. Kellogg, January 3, 1939.

Absurdity of Competing Systems

"BECAUSE of the absurdity of competing power systems it may be hoped that rates will not be forced down by direct government competition. The recent sale of the private properties in the TVA area would tend to bear this out. However, the example of the government in establishing very low resale rates in certain areas may have a tendency in the future to cause some pressure for lower rates throughout the country."



out seriously affecting the ratio of bonds to property even if all cash requirements over and above the amounts available from earnings were raised through the sale of bonds since the ratio would only be increased to 51.7 per cent. However, on this basis the amount of funded debt would be increased by 26.3 per cent and, if the industry were not compensated, by greater earnings; for the added property, the increased burden of fixed charges obviously would be unfavorable. Furthermore, the situation differs considerably between the various companies, and while the problem may be unimportant for some, it may be quite important for others.

Coming to the question of the ability of electric power companies to sell common stocks, it is apparent that this depends upon the investors' attitude toward such stocks, and the fundamental determining factor as to their attitude is the prospect for earnings. If investors anticipate an upward trend in earnings they will pay a high price for common stocks in relation to current earnings in the hope of future reward, but if the outlook for earnings does not seem to be upward the investors will have to be given very definite assurance that the trend will at least not be downward before they will be willing to pay a reasonable price. Therefore, some thought must be given to the outlook for earnings, having in mind the various threats which face the industry.

To begin with, it can be said that perhaps one of the most promising points the industry presents is that the outlook for a continued long-term upward trend in output seems to be generally accepted. It was this alone which made it possible for the industry to maintain its position in the last few years in spite of large rate reductions and increased costs. Of course, there are certain factors which suggest that the rate of growth in the future may not be as rapid as in the past. First, the possibility of wiring houses not already supplied with electricity does not present as much of an opportunity for increased sales as it has in the past because of the extent to which electricity is already used. Secondly, in the domestic field the markets for certain of

the more reasonably priced appliances such as radios and flatirons are completely saturated, and the saturation of the markets for many of the other appliances is such as to indicate that many of the people best able to buy such equipment are already supplied. In an interesting article in *Barron's*[5] it was pointed out that it is fallacious to assume that sales will double in the next ten years, as many people believe. However, the article did indicate that there may be a maximum gain over such a period of 54 per cent, and the probable increase will be 38 per cent. Such estimates are more or less meaningless because of the many uncertainties involved, but more important, for our purpose, than estimating the exact increase in output is to see what are the forces which may prevent such increases from benefiting net earnings.

IN the first place, even assuming no change in rates, an increase in sales does not result in a corresponding percentage increase in gross revenues, because electric rates are on a sliding-scale basis. Thus in any event the advance in gross revenues cannot be phenomenal. Furthermore, there is the threat of rate reductions. Some people feel that a decrease in rates is always compensated for by a corresponding increase in revenues, but this may tend to be less so as there is a greater saturation of small appliances, and it is perhaps not wholly true for large rate cuts. Also, it depends on the character of the reduction. Because of the absurdity of competing power systems it may be hoped that rates will not be forced down by direct government competition. The recent sale of the private properties in the TVA area would tend to bear this out. However, the example of the government in establishing very low resale rates in certain areas may have a tendency in the future to cause some pressure for lower rates throughout the country.

Another factor which makes the threat of rate reduction seem somewhat serious, at least as far as being a deterrent to an increase in earnings, is that the industry as a whole is probably earning at least a reasonable rate of return on its property. It is practically impossible to obtain any accurate figure regarding this point, but in 1932 the U. S. Census Bureau published a balance sheet and income statement for the commercial electric power industry. The rate of return earned on the net property account, exclusive of all the write-ups applicable to the electric power operating companies which the Federal Trade Commission revealed, plus an estimated allowance for working capital, was 6.8 per cent.[6]

SINCE then earnings have increased somewhat, but there also have been some property additions, so that the current rate of return may not be very much different. In any event, certainly many companies are now earning a rather high rate of return on their property so that their net income might justifiably be reduced through rate cuts. Another potential threat in a somewhat similar category is the possibility that the U. S. Supreme Court might sometime sanction original cost

[5] *Barron's*, Dec. 12, 1938 "Future Market for Utilities," by J. B. Weed.

[6] As given in an article entitled "A Glance at Electric Power Operating Company Bonds," by J. F. Childs. PUBLIC UTILITIES FORTNIGHTLY magazine, Vol. XXII, No. 12, Dec. 8, 1938.

as the correct method of property valuation, rather than the methods set forth in the Smyth *v.* Ames Case (1898) 169 U. S. 466, 42 L. ed. 819, and thus for many companies reduce the rate base on which the allowed rate of return is calculated.

Turning from the threats to revenues to the question of operating expenses, it can be said that there are perhaps some factors which might be considered optimistic from the near term point of view. In the first place, although expenses advanced to such an extent in the last few years that they absorbed a large part of the increase in gross revenues, they are now on such a high level that a sharp upward rise would seem unlikely. However, taxes have been one of the items of expenses which have shown a rather steady upward trend, and this may be continued. Also, there is the problem which many companies may have to face of increasing their depreciation allowance because of stricter regulation of accounting practices. This is not a cash item, but it does affect reported earnings per share. Furthermore, while there does not seem to be any immediate threat of an unusually large increase in other expenses, such as wages, materials, etc., nevertheless it is practically impossible to predict the future fluctuations of commodity prices, and the electric power industry undoubtedly would be adversely affected by a substantial increase in the price level. This is illustrated in the industry's experience during the World War years.

ASIDE from the threats to the industry's earnings, there is always the possibility that an electric power company may be forced to sell its properties due to the threat of competition. Judging from the prices obtained for the properties of the private companies in the TVA areas, the bondholders were well protected, but it was not very promising from the point of view of the common stockholder.

If anyone doubts that the industry faces many serious problems, let him consider what Professor Cabot of the Harvard Graduate Business School, who is a well-known authority on utilities, had to say about the question in an article written sometime ago, but which still seems to be applicable today. An excerpt from this article is as follows:

> . . . rates are in fact determined by "public opinion." . . . It is futile to appeal to regulating commissions for help. When faced with a united demand by the voters (who are also the customers) for lower prices, they must give way under social and political conditions that now prevail. The members of the commissions are political appointees who must bow to the public will or lose their jobs. To me it seems inevitable that the constant downward pressure of rates will ultimately result in forcing the

¶ "MANY *utility companies obviously cannot sell common stocks at the present time on a satisfactory basis. Several instances can be cited of holding companies where unsound financial practices in the past have resulted in the creation of such unsatisfactory capital structures that equity financing probably never can be undertaken by these companies unless drastic readjustments are made.*"

total income below the total outgo for all our public utilities.[7]

Undoubtedly the above remarks are too pessimistic, and truthfully the outlook for electric power bonds is rather favorable, at least over the near future. However, the common stockholder rather than the bondholder is the first one to feel the effect of any trouble, and the situation is thus more serious from the stockholder's point of view. In any event, it does not appear that the outlook is such that the industry can count definitely on obtaining exorbitantly high prices for common stocks some time in the future. Therefore, it seems well to consider the question of whether common stocks could be sold at the present time on a reasonable basis. In this connection it is first necessary to review the theoretical basis on which a utility company is financed.

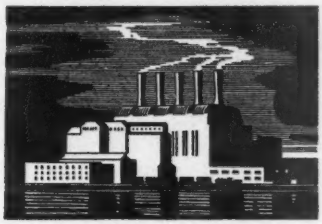
THEORETICALLY a utility company should be allowed to earn a sufficient rate of return on its property account so that it will be able to attract capital. At the present time the regulatory bodies may be assumed to allow roughly a 6 per cent rate of return on a utility property. On this basis let us see how a new electric power company costing $100,000,000 could be financed.

It would seem reasonable that at the present time $75,000,000 of the needed capital could be raised by selling $50,000,000 of 3¼ per cent bonds and $25,000,000 of 4½ per cent preferred stock. A 6 per cent return on the property would result in net income of $6,000,000, and there would be a balance of $3,250,000 after paying preferred dividends. If the remaining $25,000,000 needed to build the company were raised through the sale of common stock, then the earnings available for such stock would represent a return of 13 per cent, or the price earnings ratio would be 7.7 times. If the stock had to be sold on a more generous basis, then the company could not be financed; but it appears more likely that investors at the present time would pay a higher price in relation to earnings so that more capital than necessary would be obtained. In other words, if investors would pay more than 7.7 times earnings for the common stock, the necessary capital could be obtained with a lower rate of return on the property account.

It is of interest to note what Mr. Maltbie, chairman of the New York Public Service Commission, had to say regarding this question in a recent rate case. His approach is slightly different, but it leads to the same conclusion. He took a company with a net book value of $20,000,000 and assumed it to be financed with $10,000,000 of 3½ per cent mortgage bonds, $4,000,000 of 5½ per cent preferred stock, and $6,000,000 of common stock and surplus on which earnings equaled 7 per cent (price earnings ratio of 14.3 times). He showed that the rate of return on the $20,000,000 of property in order to permit financing on this basis would be 4.95 per cent.

He also took another example of a company with a $20,000,000 net property account with the same capitalization as above and assumed a 6 per cent return on the property. He then pointed out that if the bonds were 4 per cent, and the preferred stock 6 per cent, the remaining earnings would represent a return of 9⅓ per cent (price

[7] *New York Sun*, Annual Number, January 8, 1938.



Stock Distribution

"THERE apparently have been only three important examples in the past few years where electric power company common stocks have been distributed to the public. In 1935 the Boston Edison Company sold $12,300,000 of common stock to the public; in 1937 the Tampa Electric Company sold $630,000 of common stock to its stockholders; and, in 1938, $8,000,000 of North American Company common stock owned by an investment trust was redistributed by a syndicate."

earnings ratio of 10.7 times) on the common stock and surplus. He went on to say:

> The above computations show that on the basis of the current market rates for utility securities, which have prevailed for several years, a 6 per cent return is ample and even generous. It exceeds the actual cost of raising funds for a public utility in this state which is soundly financed and properly conducted. Any utility corporation which cannot earn for its stockholders an adequate return upon the basis of a 6 per cent return has neglected to conduct its affairs upon the basis of sound finance and engineering.[8]

IT is now perhaps well to see how much investors actually have been willing to pay for common stocks over the past few years and how much they are willing to pay at the present time. In order to do this it seems best to take nine common stocks of companies which are well capitalized, and first determine the relationship of the prices for these stocks during the past four years to the earnings of the various companies. This is shown in Table II.

The figures in the table refer to the averages obtained by dividing the various prices for the stocks into the earnings available for the stocks, or in other words, the reciprocal of the price earnings ratio. The averages are based on three different prices as follows: The highest market price for each stock in each year, the lowest market price, and the average for the high and low market prices. From this table it can be seen that in each of the four years the relationship of the earnings to the highest prices was on a 6.5 per cent basis or better, and that the percentage based on the average of the high and low prices was 7.8 per cent or better. Thus it appears that in each of these years common stocks were at

[8] Case Nos. 6367 and 8403, Re Queens Borough Gas & E. Co. Report dated Nov. 22, 1938 (29 P.U.R. (N.S.) —).

TABLE II

Relationship of Earnings Available for Common Stocks of Nine Well Capitalized Companies to the High and Low Market Prices for the Stocks, and Average of the High and Low Prices.

	1938	*1937*	*1936*	*1935*
Earning on common stock/high price	6.5%	5.6%	5.3%	5.4%
Earning on common stock/avg. high and low	7.8%	7.2%	6.9%	7.4%
Earning on common stock/low price	9.9%	10.4%	7.2%	12.2%

times selling on a quite reasonable basis in relation to earnings. The average market price of these stocks on April 15, 1939, of $55, even with the depressed market conditions then existing, compared with the average book price (surplus plus stated value of the common stock divided by the number of shares of common) of $57, and latest earnings, represents an average return of 6.9 per cent of the prices at that date.

MANY utility companies obviously cannot sell common stocks at the present time on a satisfactory basis. Several instances can be cited of holding companies where unsound financial practices in the past have resulted in the creation of such unsatisfactory capital structures that equity financing probably never can be undertaken by these companies unless drastic readjustments are made. In any event, a weak holding company which cannot contribute equity money for its subsidiaries should not prevent any of its subsidiaries from selling a minority interest directly to the public. A few of the operating companies would now be prevented from selling common stocks because of the threat of government competition. However, in spite of the threats to which the industry as a whole has been subjected, most companies which are unable to finance with

TABLE III

ABILITY OF THE INDUSTRY TO SELL COMMON STOCKS

(000's omitted)	*Stated Fixed Capital (Incl. allied services)*	*Per Cent*	*No. of Cos.*	*Per Cent*
Companies that probably could sell common stock ..	$7,997,000	58	51*	31
Companies for which it appears questionable whether common stock could be sold	2,033,000	15	41	25
Companies which could not sell common stock	3,686,000	27	71	44
	$13,716,000	100	163	100

* Includes two holding companies, each treated as a unit, which probably could finance their subsidiaries through sale of their own stocks.

equity securities, as Mr. Maltbie has said, have only themselves to blame for resorting to unsound financial practices instead of building up strong capital structures. It would seem clear that such companies should now retain their earnings so as to reduce their debt rather than pay common dividends.

It is almost impossible to make an accurate estimate of the proportion of the industry which could finance with equity securities at the present time. Mr. Douglas, formerly chairman of the Securities and Exchange Commission, has stated that dividend arrears on preferred stocks "in effect . . . virtually forbid equity financing to about half the industry, since plainly enough investors will not invest without hope of return."[9]

In Table III an attempt is made to estimate very roughly the portion of the industry which might be able to finance with common stocks, consideration being given only to companies with a gross property of approximately $10,000,000 or more. Obviously there may be some difference of opinion regarding any such estimate.

In this table separate attention was paid to each operating company, except operating companies owned by two holding companies. These were treated as units since it appeared that these two holding companies could sell common stocks themselves and thus contribute equity money to their subsidiaries. Companies which had dividend arrears on their preferred stocks, or which for other reasons obviously could not sell common stocks, were put in classes by themselves. Other companies for which there was no definite reason why they could not finance, but for which it appeared questionable, were put in a separate category. From this table it can be seen that companies with assets representing approximately one-half the industry might possibly be able to sell common stocks.

There apparently have been only three important examples in the past few years where electric power company common stocks have been distributed to the public. In 1935 the Boston Edison Company sold $12,300,000 of common stock to the public; in 1937 the Tampa Electric Company sold $630,000 of common stock to its stockholders; and, in 1938, $8,000,000 of North American Company common stock owned by an investment trust was redistributed by a syndicate.

From the discussion of the possible amount of new capital that may be

[9] *The Annalist*, June 3, 1938, page 747.

❦

¶ *". . . one of the most promising points the [electric] industry presents is that the outlook for a continued long-term upward trend in output seems to be generally accepted. It was this alone which made it possible for the industry to maintain its position in the last few years in spite of large rate reductions and increased costs. Of course, there are certain factors which suggest that the rate of growth in the future may not be as rapid as in the past."*

needed in the future, it does not appear that the industry will be immediately damaged by continuing to finance part of its requirements with bonds, and the immediate present might not be the best time to attempt to sell common stocks, particularly in large amounts. However, considering all of the problems which the industry has to face, it will be well for the companies that are now able to finance with common stock not to wait for too exorbitant prices to place themselves in a stronger rather than a weaker position so as to be better able to combat future problems.

Communications and the National Defense

"I AM *very happy to report to you that the situation in the wire industry has improved tremendously. Today, you are better prepared than ever before to meet the demands of the Army, not only for telephone lines, but for all of the 800 different wire products that we need for war. With the hearty coöperation of your association, the Army has made a survey of your trade and has found it physically equipped and well organized to meet our demands in an emergency. I congratulate you on the executive ability of your leaders. You have much cause for pride in the scientific skill of your foremen and your workers.*

"You have the machinery to meet the demands of any war within the concept of modern military needs. Unfortunately, however, you still have a very serious bottle-neck that must be removed before you can fully meet the needs that may be made upon you. Today, you have an adequate supply of skilled operators with a record of excellent performance. Will you be able to maintain the superb craftsmanship which now characterizes your trade when the demand for your products is multiplied six, seven, or perhaps eightfold? Will you be able to recruit an additional supply of skilled operators to maintain and run your delicate machines? Your answers, I am sorry to say, will have to be in the negative.

"You are not alone, however, in facing the prospects of a shortage in skilled workmen. Not only your trade, but all American industry which may be called upon to produce munitions of war, is confronted with a similar problem. To assure us an adequate supply of skilled workmen is a challenge to all patriotic Americans interested in adequate national defense. We are grappling with the situation in the War Department but, frankly, we have not yet met it successfully. It may help us, perhaps, if we analyze the problem in greater detail."

—EXCERPT *from address by Louis Johnson, Assistant Secretary of War.*

What Next in Brazil?

It would seem that at present the further nationalization of existing public utility companies is not on the agenda of the administration, says the author, but that, on the other hand, there is nothing to prevent the issuance of such a decree at any time, and that the extent to which nationalization will go in the future is difficult to prophesy. The economic and political picture.

By LOUISE C. MANN

When Getulio Vargas proclaimed himself dictator of Brazil, foreign capital wondered what the future would bring. Each new Constitution promulgated by the Brazilian government had been more nationalistic than the last, and the one of November, 1937, proved to be no exception. Did this mean that Brazil would eventually follow in the footsteps of Mexico, or that it would succumb to Nazi and Fascist influence?

Public utility executives in Brazil considered that they had already had their share of headaches. The milreis had been depreciating ever since Brazil went off the gold standard shortly before the United States took similar action.

The capital was invested and rates fixed when the milreis was selling at 8.5 to the dollar. At present it is selling at 17.7 to the dollar, while there has been no corresponding increase in consumer purchasing power to justify sufficient increase in rates.

As long as the income from the utility services is spent for Brazilian labor and construction work with Brazilian materials, the result is not so devastating; but when equipment has to be imported from the United States and interest on the capital investment remitted abroad, real problems arise from the depreciated currency. Furthermore, there is absolutely no exchange available for the transfer of dividends, even if any should be earned.

The total foreign utility investment in Brazil is estimated at $490,000,000. The greater part is controlled by Brazilian Traction, Light & Power, a Canadian company with some United States capital. Its properties are in Rio de Janeiro, São Paulo, and Santos, comprising the two largest cities in the country, where it controls electric power, telephones, and trams. Most of the other cities and outlying districts all over the country are serviced by Emprezas Electricas Brazileiras, a subsidiary of American & Foreign

Power. Its territory includes Bahia, Pernambuco, Victoria, Campinos, Belle Horizonte, Coritiba, Porto Alegre, and Pelotas. The South American Utility Company has a few small plants in the South.

There are several hundred telephone companies in Brazil, grouped into four principal systems, without adequate interconnection. The largest is the Brazilian Telephone Company, controlled by Brazilian Traction. Electric Bond and Share owns the telephone system in the North, Recife and Bahia; International Telephone has the southern system in Rio Grande do Sul and Paraná, and also some lines in Rio de Janeiro; and the fourth system is in the state of Santa Catharina.

BRAZIL is fortunate in having unlimited resources of hydroelectric power, especially since she produces no oil and only a limited supply of coal. Of her 378 important waterfalls, 154 offer a potential hydroelectric power of 50,000,000 horsepower, of which only 834,612 was being utilized in 1935. The trouble is, however, that the best waterfalls are too far away from the consuming public. Nevertheless, most of the power in the country is produced by hydro, with a few exceptions. Brazilian Traction uses steam only for emergencies in dry weather, while Emprezas Electricas has six or seven thermal units burning native coal, and one Diesel station, to 27 hydroelectric. Although in 1935 the number of thermal stations was 446 to 573 hydraulic, the thermal horsepower produced was only 175,934 to 834,612 hydraulic horsepower.

On account of the shortage of coal, the Brazilian factories are potentially consumers of electricity. Actually, however, I saw factories at Campinos burning wood for fuel, so that the electrification of the country is far from complete. Some of the railroads are electrified, some use imported coal (the native coal is said to contain too much sulphur), and some burn wood. The railroad companies have planted forests of eucalyptus trees to be consumed as fuel. Thus Brazil offers tremendous possibilities for the development of hydroelectric power; but domestic capital has not yet reached that stage of development, while large-scale foreign expansion is prevented by three factors: The impossibility of raising new capital, the nationalistic program of the administration which prevents the granting of new concessions, and the virtual exclusion of foreign executives and technicians.

IN Brazil the utility concessions are made with the individual municipalities. It was the policy of the foreign companies to have a gold clause incorporated in the concession, whereby rates could be raised in the event of currency depreciation, in most cases to 50 per cent of the fluctuation. In return for this gold guaranty, the companies consented to make certain necessary improvements, feeling that the gold return on their investment was safeguarded. When the depression set in, however, and the currency dropped from 8.5 milreis to the dollar in 1929 to 16 to the dollar in 1931, the corresponding increase in rates did not work out satisfactorily. From the consumers' standpoint it was an awful nuisance, because the rates were changed every month, making it impossible for them to know what to expect in the

way of a bill. From the company point of view it was also a failure, because after a certain point revenues began to fall off owing to lack of consumer purchasing power.

Finally the Brazilian government took matters into its own hands, and, following the precedent established by the United States government which had abrogated the gold clause in the government bonds, issued on November 27, 1933, a decree abolishing entirely the gold clause in the concessions. The rates thus resumed their original level, and new concessions had to be arranged with the municipalities.

This system of municipal control has worked out very well. The desire on the part of the municipalities for adequate service is greater than the prejudice against foreign capital. Before 1930 several municipalities had tried to run their own power plants, but had succeeded only in running up deficits. Therefore, when American & Foreign Power began to expand in the country, these municipalities petitioned the company to take them over.

ANOTHER advantage of municipal concessions is that the power of the municipalities is limited in regard to the levying of taxes. On the other hand, the companies feel their obligation to the communities in the supplying of service. Although no new capital has been forthcoming in recent years, owing partly to the conditions in the United States as well as the situation in Brazil, revenues have been sufficient to take care of normal expansion. Since no profits in the form of dividends are allowed to leave the country on account of the exchange shortage, the money might as well be spent in expansion.

This system of municipal rate control, however, is not destined to last forever. The tendency in Brazil under the Vargas régime is toward the progressive centralization of administrative power. Federal control of rates is expressly provided for in Art. 147 of the Constitution of 1937:

> The Federal law will regulate the fiscalization and revision of the rates of public services exploited by concessions in such a way for the general good, that the capital may receive a just return and also attend properly to the demands for expansion and betterment of the services. The law will apply to rates made during the previous régime, regarding rates stipulated by contract for the life of the contract.

Since the Brazilian government already has more on its agenda than it can handle efficiently at the present time, it is not thought by those informed that this article will be enforced in the immediate future, unless some

¶ "THIS *system of municipal control has worked out very well. The desire on the part of the municipalities for adequate service is greater than the prejudice against foreign capital. Before 1930 several municipalities had tried to run their own power plants, but had succeeded only in running up deficits. Therefore, when American & Foreign Power began to expand in the country, these municipalities petitioned the company to take them over.*"

emergency arises similar to that of 1933. Will the Federal government, which is extremely nationalistic, be as friendly toward the foreign companies as the municipalities who realize that they are getting good service at practically the lowest rates in the world?

AND what is a reasonable return on capital investment in Brazil? Does this clause apply to foreign capital; and, if so, is the return to be in terms of milreis or gold? If domestic capital is intended, will the return be according to current interest rates, which range from 10 per cent to 30 per cent on good investments, or will it be arbitrarily fixed at some theoretical figure with which a potential investor should be satisfied, say 7 per cent, as it is in the Argentine? (The transportation facilities in Buenos Aires are in the process of unification, with a guaranty of a 7 per cent return to the investor.) And, furthermore, when first mortgages yield from 10 per cent to 12 per cent will there be a rush to buy utility securities at 7 per cent? But it is idle to keep on asking these questions indefinitely, because it is doubtful if Getulio Vargas himself knows all the answers.

From this enumeration of the problems involved in rate fixing, one would surmise that it would take the Federal government and the Federal Power Commission, when appointed, years of statistical study in order to arrive at a fair rate, with interminable lobbying by both power companies and consumers. But that is not the way the Brazilian government functions at the present time. Some fine day President Vargas will produce a yardstick out of his hat; it will be published as a decree-law in the morning papers; and it will be just as fair to the investor and the consumer, and just as scientifically conceived, as that evolved by the TVA, and without the enormous expense of constructing a huge project.

THE same difficulties were faced in regard to telephone rates. The situation was especially serious in the city of São Paulo, because the city was growing so rapidly that the installation of new equipment became an expensive proposition. The population of São Paulo has almost doubled since 1920, growing from 579,033 in that year to 1,167,862 in 1936. In spite of the currency depreciation, the rates have remained the same. For example, the cheapest service, which was unlimited domestic service with wall phone, was about $1 per month, and about 20 cents extra for monophone. The Brazilian Traction, Light & Power Company had been trying for ten years to have the rates raised; finally the service became so bad that popular opinion became aroused and in March, 1938, the rates were raised 50 cents a month, making the minimum charge $1.50 per month, with greatly improved service.

The tramcar situation in Brazil is also quite interesting, and gives a good idea of the effects of inflation. In the first place it took years of promotion of the sale of bonds to provide the capital for the installation of tram services. The bonds finally became a joke, so that when the street cars first appeared they were called "bondes," which word has gradually become incorporated into the Brazilian language as synonymous with street car.

The fare was fixed at 200 reis, which it has been ever since. Originally worth

Telephone Companies in Brazil

"THERE *are several hundred telephone companies in Brazil, grouped into four principal systems, without adequate interconnection. The largest is the Brazilian Telephone Company, controlled by Brazilian Traction. Electric Bond and Share owns the telephone system in the North, Recife and Bahia; International Telephone has the southern system in Rio Grande do Sul and Paraná, and also some lines in Rio de Janeiro; and the fourth system is in the state of Santa Catharina.*"

about 7 cents, it may have been a trifle exorbitant at the time, compared with the earning power of the people; but with the gradual inflation it is now only one cent. The Brazilian Traction Company claims that this is the cheapest tram fare in the world. (As a matter of fact, at present rates of exchange, the fare in Chile is a little cheaper, amounting to .8 of one cent.) At the present fare, the equipment cannot be increased or improved; and service to outlying districts is being discontinued. Although the street cars are manufactured in Brazil, the motors and control gears have to be imported; yet every time the Brazilian Traction Company suggests raising the fare, the danger of a social revolution becomes so imminent that nothing can be done about it. In Bahia, when fares were raised, there were riots resulting in the burning of 40 street cars.

As a last resort, the traction company is inaugurating trackless trolleys in São Paulo, with a 2-cent fare. By changing the form of transportation, the people will think they are getting something better, and be willing to pay more, as they are already doing in busses. Plans have also been made for the construction of a subway in São Paulo. At a fare of 2½ cents it could be made to pay, with cheap labor and power; but the concession has not yet been granted at that rate. Since the tram concession with the city of São Paulo runs until 1940, the company is obliged to furnish transportation until that date. It would like the city to take it over before then, but the city is not interested.

The Brazilian Traction, Light & Power Company has one of the largest foreign-owned manufacturing plants in South America, with 1,300 em-

ployees. They make as many of their replacement parts as possible, not only for themselves but for other companies operating in Brazil. Domestic equipment is necessary, not only on account of the depreciated currency in which revenues are received, but on account of the shortage of exchange available for imports.

There are three reasons for the existing shortage of exchange: the low world prices of coffee and cotton, an oversold exchange position from the year before, and the purchase by the Brazilian government of cruisers from England and armaments from Germany and Italy, which had to be paid for with cash, partly in advance.

The result is that the United States alone has an estimated $10,000,000 in Brazil awaiting exchange coverage. Commercial import drafts are being liquidated only in small amounts, and at present the Bank of Brazil is so congested with drafts awaiting payment that it is forty-two days behind in coverage.

THE shortage of exchange is so acute that last year the Brazilian government suspended service on its external bonds. There is no exchange available for the transfer of profits of any kind, such as dividends; but bond interest may be covered by the payment of an exchange export tax of 6 per cent. The result is that it is impossible to raise new foreign capital for Brazilian enterprises because the profits would be of no benefit to anyone not residing in Brazil. How can dividends be paid or bonds amortized?

Aside from the difficulty of raising new capital, large-scale construction of public utilities by foreign companies could not take place because foreign technicians and business men are excluded from the country. The 2 per cent quota regulation, of which 80 per cent have to be agricultural workers, leaves only forty-four immigrants for other purposes. Furthermore, the foreigner residing in Brazil must become a Brazilian citizen. The business man must deposit $2,500 to his account in the Bank of Brazil, and the technician must go through innumerable formalities. The result of all these regulations is that in 1936 only thirteen North Americans emigrated to Brazil. The others merely stayed on a 6-month tourist visa, and then probably went to the Argentine.

Even if it were possible to introduce new capital, executives, and technicians into the country, the new Constitution forbids the granting of new hydroelectric power concessions to foreign companies. According to Art. 143:

> . . . the industrial use of . . . water and of hydraulic energy, even when privately owned, depends on Federal authorization. The authorization can be given only to Brazilians or to companies composed of Brazilian shareholders, the proprietor having preference in the exploitation of, or the participation in, the profits. . . . No authorization is required in the case of waterfalls in industrial use on the date of this Constitution.

FURTHERMORE, the eventual nationalization of all water power is on the government program. Article 144 regulates the "progressive nationalization of mines, mineral deposits, and waterfalls, or other sources of energy, as well as those industries considered basic or essential to the economic or military defense of the nation."

This article has been in the Constitution for a number of years without

having been administered in regard to waterfalls. On the other hand, Art. 146 has already been enforced: "Companies which are concessionaires of Federal, state, or municipal public services must have their management contain a majority of Brazilians or delegate all the powers of management to Brazilians."

This regulation, or others similar, is in force in most Latin American countries, and makes for better international feeling between the countries involved.

Note one very important fact in this article: the management must be Brazilian. Nothing is said about shareholders. Article 145, dealing with banks and insurance companies, says that they "may operate in Brazil only if their shareholders are Brazilians." Furthermore, something is being done about the enforcement of this idea, which means complete nationalization.

Thus it would seem that at present the further nationalization of existing public utility companies is not on the agenda of the administration. On the other hand, there is nothing to prevent the issuance of such a decree-law at any time. Nothing is said in the Constitution about the nationalization of oil refineries; yet as soon as the Standard Oil Company began to build a small refinery, the nationalization of oil refineries was announced.

THE extent to which nationalism will go in the future is difficult to prophesy. Foreign Minister Oswaldo Aranha told me that Brazil, being a young, jealous country, was extremely nationalistic, but that he thought the trend would be less so in future. United States Ambassador Jefferson Caffery also said that the nationalist feeling in Brazil was not conclusive.

One utility company executive told me that the nationalistic trend was unpredictable, because the statesmen in charge themselves had not fully formulated their program. Brazil is a land of undercurrents; it is hard to make definite statements of fact. Her leaders say they are friendly to foreign capital and then they pass laws prohibiting it from entering almost every conceivable industry; they say they welcome foreign business men and technicians, and then they refuse them admission to the country.

There is a definite reason for this contradiction; the leaders are torn by two conflicting ideas. Theoretically, they want Brazil to be developed by domestic capital, which should also acquire all the enterprises now being operated by the foreigners. Realisti-

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¶ "THE *shortage of exchange is so acute that last year the Brazilian government suspended service on its external bonds. There is no exchange available for the transfer of profits of any kind, such as dividends, but bond interest may be covered by the payment of an exchange export tax of 6 per cent. The result is that it is impossible to raise new foreign capital for Brazilian enterprises because the profits would be of no benefit to anyone not residing in Brazil.*"

cally, they realize that it will be a long time before Brazilian capital is in a position to develop the country, and that national capital would develop faster with the assistance of foreign capital. It is this conflict of theory and fact which produces many of the contradictions in Brazilian policy.

This question of new capital is important, because future power development in Brazil should be hydroelectric, which requires a much larger outlay of capital than the thermal generation of electricity.

PRESIDENT Vargas is very definite about the fact that Brazilian capital should develop the country, and has said so repeatedly in his press conferences. He declared that many of the vital questions relative to the evolution of Brazil depended upon the mobilization of capital. He did not believe that with the help of foreign capital alone the country could make progress. He stated that since the Great War the immigration of capital had very considerably diminished; on the other hand, the progress in the formation of national capital had reached an advanced stage of development. In his opinion the country's big task at the moment was the mobilization of national capital, which would assume a dynamic character in the economic conquest of the backward regions.

United States Ambassador Jefferson Caffery felt that Brazil and the United States could be mutually helpful in the question of capital.

"Every day it becomes increasingly clear," he said in concluding his interview with me, "that the only possible answer to international economic disorder is the eventual triumph of the policies of Cordell Hull, creating opportunity for the investment of foreign capital all over the world and opening new doors of business opportunity."

Under the leadership of President Vargas, the Brazilians have awakened to a new feeling of national consciousness which is even stronger than any experienced before. For this reason, fears that German Nazi or Italian Fascist penetration will gain a foothold are groundless. Furthermore, the present administration has been as ruthless in suppressing Communism as Fascism. Brazil is in every respect a capitalist nation.

EVER since the wave of expropriation in Mexico, foreign capital in other Latin American countries has been a little nervous. I was told on every side that there was no danger of expropriation in Brazil. While the nationalist policy of Brazil wants domestic private capital to take over the properties of foreign private capital, the rights of private capital are still respected, and there is little trend toward state socialism, especially in regard to public utilities.

It is true that the Brazilian government runs the national telegraph, but not very efficiently, since it incurs an annual deficit. According to the Brazilian Year Book, in 1936 the revenue from the postal and telegraph services was 108,781 contos, while expenditures were 143,071 contos. The theory that the government can supply service more cheaply than can private capital is true if the taxpayers are willing to foot the bill. The result is that those who consider speed a necessity of telegraph service use the more expensive private communications, which is

possible because Western Union operates competing cables up the coast.

At present there are several other favorable factors in the utility situation in Brazil. In 1937 the Brazilian Traction, Light & Power Company received a net revenue of $10,886,281, as against $6,243,888 in 1936, and so on down to $3,428,955 in 1933, the lowest year. Furthermore, net profit for the first seven months of 1938 is only off about 2½ per cent. While Emprezas Electricas Brasileiras, S.A., does not publish corresponding figures, operating revenues in 1937 were $12,054,279, against $9,274,655 in 1935.

PROSPERITY and business activity in Brazil do not depend on the New York stock market. The import business may depend on the price of coffee; but the less the importation of foreign goods, the greater the activity of domestic manufacture. When I asked Brazilian business men about the recession, they either looked blank or began to talk vaguely about 1932. Señor Valentin Bouças, the Technical Counsel for Economics and Finance to the Minister of Finance, said that local business was 100 per cent good. The recent mild inflation caused the greatest building boom that I saw in South America. The whole Copacabana beach is being rebuilt with modernistic apartment houses. The entire business district of São Paulo is being torn down and reconstructed, while the streets are all torn up in the process of widening. Building permits are being issued at the rate of thirty-three a day. The Brazilian Traction, Light & Power Company is doing its bit with a new telephone exchange building in São Paulo. It is small wonder that these companies are unable to pay dividends; all the profits are needed for expansion.

Furthermore, there are no labor troubles. Both employer and employee are satisfied with the 48-hour week. The utility companies have pension and retirement funds. In spite of the currency depreciation, the workers are still well off, according to Dr. José Garibaldi of the São Paulo Cotton Institute, because the cost of living has risen only 30 per cent, while the value of the money has dropped 50 per cent.

Brazil is a large, undeveloped country with immense territory and resources, both agricultural and mineral. While most of the world is suffering from overpopulation, Brazil is suffering from a shortage of labor. While the United States is suffering from low interest rates and idle money, Brazil continues to remain undeveloped because of lack of capital. And while our government pours out millions of dollars to provide electricity for towns which are already adequately supplied with electricity, the waterfalls of Brazil remain unharnessed while some of her factories and locomotives continue to burn wood for fuel.

"UNEMPLOYMENT and relief should not get mixed up with duplication of electric facilities through Federal subsidy or otherwise. "Now is the time for government and the utility industry to understand and serve each other and to initiate and go forward with such a program as will relieve unemployment and assist in eliminating relief."

—BRYAN HANKS, *President, Florida Power & Light Company.*

"Sorry, Madam, but Our Service Stops at the Meter"

An occasional attitude toward customers, in the opinion of an employer, is bad for a utility company. Cheerful, courteous, and faithful service, the key to the public relations problem.

By JESS P. PASCHALL

If ever there was a time when a fellow needed a friend, it is today, and that fellow is the chief executive of almost every power company east and west of the Rocky mountains. These gentlemen, who, incidentally, never have been permitted to say much about the way their business should be run, are faced with competition with the United States government, and that is something to worry about; and more, and even worse, they are forced to dig down into their own pockets to help pay the cost of operation of their competitor's business; for it is with Federal tax money that all these great hydroelectric plants are being thrown across the rivers of our country.

To say that there was, or is now, need for all these public power plants Uncle Sam is building is nonsensical; but that is neither here nor there. We have them with us, and it behooves us to adjust ourselves so as to live with them in the hope that good will come to all who will have to pay the bill; and that is *all* of us, even the dust-ridden people of the Middle West, thousands of miles from these power projects. Those who are far away will contribute just as much to their construction as those who live within a stone's throw of them. It is the people who have willed that we shall have them, and it is likewise the people who will pay the bill.

It is easy to work ourselves up over the possibility that the privately owned and operated utility will be put out of business by government competition, but, personally, I do not see this industry brought to an end that way. I am sure that we of the electric industry agree with the President in his declaration in favor of the "widest possible" use of the current generated at these public plants. Goodness knows we have long sought the "widest possible" use of the current generated at our plants. We have not, however, had the

money, nor could we borrow the money, to run lines hither and yon into the sparsely settled areas where the cost of the service would greatly exceed the potential revenue.

As I have indicated, I do not believe that our industry is doomed to die, notwithstanding the government's activities. If the farms, homes, and factories of America are to be completely electrified—and some day I believe they will be—the job is our responsibility. I cannot believe that America will legislate out of business the industry that has, for more than a half a century, pioneered and carried on work and dreams of Benjamin Franklin, Thomas Edison, Charles P. Steinmetz, and a host of others, and which has made possible the comforts and conveniences that electricity has brought into our homes.

Let us not make faces at those who would disagree with us concerning the ownership and operation of electric utilities. Rather, let us prove by our actions that it is best for all concerned that we be permitted to carry on our program of constantly improving our service and reducing rates as we have done for fifty years. Let us admit our mistakes, wherever we have made them, and correct them wherever necessary to do so; but let us not continue on the *defensive* as much as we have in the past.

I once saw a prize fighter almost *hors de combat* when it looked as if one more blow would bring him to the canvas for the count; but suddenly, in his groggy condition, he changed his tactics. He not only got out of danger but finally took the *offensive* and won the fight. Many a contest has been won after it appeared to have been lost. Obviously, all that the utilities need is the customer's good will, something that cannot be bought. It must be earned like friendship and, when it is, it must be made a permanent asset.

I believe it possible to conduct our business in a manner that will in itself refute the false charges constantly being made against us. We can do this if we act as if we were—as we are—*servants* of the people, willing to serve as good servants should. Unfortunately, so many of the contacts we make with our customers are in the home where we must be doubly careful about what we say and do.

The range service man is called to the kitchen where the housewife has just had her prize recipe for the birthday cake spoiled due to a current failure. Chances are a hundred to one that it is through no fault of ours, and yet we are almost sure to be blamed for it by the irate little housewife. At any rate, the service man is on the spot and will need every wit he possesses if he is to leave with the customer's good will. If he finds the trouble to be on the customer's side of the meter and is of such a nature as to require the services of a licensed electrician, he must be careful not to use that time-worn phrase, "I'm sorry, madam, but our service stops at the meter."

Our *service* does not stop at the meter. It extends to the light bulb, the flatiron, the washing machine, and the range. It is continuous. It is a day and night service — the in-sickness-and-death kind—for rich or poor. On rainy days and on bright summer days, the electric service goes on and on and on. Driving sleet and blinding snow

Public Relations

"GOOD public relations . . . is the ray of hope for the power companies. Adequate service at reasonable rates is of course a fundamental requirement for the establishment of such relations; but we must look beyond that . . . We might even take more interest in the affairs of the communities we serve. But the public relations problem will be solved when every man and woman in our industry renders cheerful, courteous, and faithful public service."

find our men shinnying slick poles to see to it that the service *does* continue; and yet we are sometimes guilty of conveying the false impression that our interest in the customer's service ceases at the meter.

The director of public relations is helpless unless he can have the coöperation of every man and woman in the organization. He can be able to recite the Golden Rule backwards, forwards, and in seven different languages, including "Pig" Latin, and still get nowhere unless he has the combined support of us all.

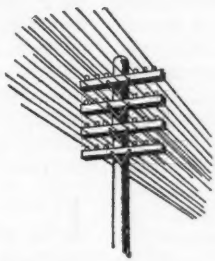
PUBLIC relations activity is something that must be company-wide and participated in by all departments. We must all be "directors" of this important phase of our business. It would be well for the man who is in *charge* of this activity to examine, very carefully, some of our "operating policies." I am thinking, for example—because the customers have made me think of it so often—about that policy requiring the customer to put up a "meter deposit" before he can be served, provided, his credit rating seems to justify such action on the part of the credit man.

We have discovered by research that a newcomer riding into a city with his worldly goods, and his wife and his children in the family bus with him, has one paramount thing on his mind. With funds running low as a result of unexpected contingencies, where is he going to get the five bucks for the "meter deposit" so that he can have the lights turned on? If he can't get the five, is he going to sit in the dark and thereafter be a booster of the utility

company? An imaginative illustration, of course, but it represents a problem. What about it? I must confess that I do not know the correct answer to this one. Admittedly, this policy cannot be done away with entirely, but I *do* think it must be applied with a certain amount (and a generous supply at that) of soothing syrup.

GOOD public relations, we appreciate, is the ray of hope for the power companies. Adequate service at reasonable rates is of course a fundamental requirement for the establishment of such relations; but we must look beyond that, as already indicated. We might even take more interest in the affairs of the communities we serve.

But the public relations problem will be solved when every man and woman in our industry renders cheerful, courteous, and faithful public service. When that is done the real truth about the industry may be broadcast with confidence that the people will tune in and listen. Our actions will speak louder than hostile politicians' words.



Telephone Progress in Eire

STRIDES being made in Irish telephone service were described in detail in a reported inaugural address of James W. O'Neill as chairman of the Irish Center of the Institution of Electrical Engineers in Dublin. Irish telephone service is state owned but is regarded as a commercial enterprise because extensions are charged to capital account and income is required to cover operating, maintenance, and depreciation expenses, in addition to providing a 5 per cent return on outstanding capital. Any surplus in excess of the 5 per cent interest is considered as profit, whereas a deficiency below that amount is regarded as a loss.

Since 1932 Irish telephone service has been profitable, according to this standard. The first automatic dial exchange was put into service in 1927 in the city of Dublin, and by the autumn of 1939 it is expected that 90 per cent of the telephones within a 10-mile radius of the center of that city will be on a dial basis (which would constitute 60 per cent of the telephone service of the country).

Because the distances between Dublin and the more important provincial centers are generally over 100 miles with few intermediate points of importance, the Irish long-distance technique is rather unique, using only a system of 3-channel carrier current working on open wires for the backbone trunk circuits. There also has been some ingenious improvement in submarine cables to take care of the increasing cross-channel traffic to England.

There are a number of small rural exchanges, which is indicated by the fact that of some 800 exchanges more than 600 had fewer than ten subscribers each.

Wire and Wireless Communication

THE action of the Wisconsin Supreme Court on July 11th, setting aside as unreasonable rate reduction orders of the Wisconsin commission against the Wisconsin Telephone Company, was regarded as perhaps one of the most important decisions of the year in the field of communications regulation. The recent decision of the U. S. Supreme Court in the Rochester Telephone Corporation Case was, of course, of more general importance. But it turned on broad regulatory principles of appeal and review, whereas the Wisconsin Telephone Company Case was essentially a telephone decision from start to finish.

The highest state court generally upheld the views of the lower state court Circuit Judge A. C. Hoppmann, although it did not go so far as Judge Hoppmann in denouncing the commission's procedure and findings.

Specifically, the state supreme court held unreasonable a 1934 temporary rate order and a 1936 permanent rate order. The latter would have reduced the company's rates by $863,000 a year. The court estimated the company's rate base at $53,500,000, as against the $51,000,000 fixed by the circuit court and $35,000,000 fixed by the state commission. On the increased rate base the court found that the commission's rates would have yielded a return of only 3.1 per cent.

Probably the most noteworthy feature of the court's opinion, however, was its criticism of the commission's "evident bias." This seemed to be directed principally at the testimony of the commission's former engineer with respect to alleged "excess plant." By the same token, the court's opinion results in some embarrassment in Washington, because the recently completed special telephone investigation was based to some extent, not only upon staff evidence collected by several of the same Wisconsin commission staff officials who made the record in the Wisconsin Telephone Company Case, but the same methods and analogous findings were followed.

IT was regarded as exceedingly doubtful whether any appeal from the decision of the Wisconsin Supreme Court would be taken to the U. S. Supreme Court, although Harold M. Wilkie, special counsel for the commission, was quoted as saying in Madison on July 12th:

> We are now studying the decision. We are examining it carefully before determining whether to file a motion for rehearing before the state supreme court. If we so decide, the motion must be filed within twenty days. We also may decide whether to take an appeal in the two unfavorable rulings before the United States Supreme Court.

The implication contained in Mr. Wilkie's reference to the two "unfavorable" rulings probably recalled the fact that the Supreme Court did uphold the commission's finding which fixed a 3.56 per cent depreciation rate for the company in 1934, as compared with the company's claim of 4.53. Even so, the court observed that the commission rate left very small margin, but that it was not the function of the court to invade the

province of the commission, except in a very clear case of abuse.

In this respect, therefore, the commission's order requiring the telephone company to reduce its depreciation charges $550,000 a year was upheld. Whether this portion of the commission's order will be separately enforced or whether the telephone company would further resist it could not be immediately ascertained.

As far as the Federal judicial code is concerned, it is theoretically quite permissible for a state commission to appeal even from an adverse decision of its own state supreme court. Although the practice is extremely rare, the Supreme Court has actually issued writs of *certiorari* to review at least two state supreme court decisions under such circumstances: One from Rhode Island (273 U. S. 83) and one from California (264 U. S. 331).

However, to qualify for such a writ it would be necessary for the state commission to formulate some Federal question upon which to take the appeal, and such an issue is not immediately apparent in the Wisconsin Telephone Company Case.

THERE was also the more practical question of finance. Whether the state commission, acting under the present Wisconsin regulatory act, would be authorized to use any part of its general appropriation to prosecute such an appeal in the U. S. Supreme Court is doubted in some quarters. Then there was the further complication of a reorganization bill (pending at the time in the state legislature) to abolish the present 3-man public service commission in favor of a 1-man tribunal. Regardless of the outcome of this bill, it was felt unlikely that the state legislature would be disposed, under the circumstances, to authorize any additional appropriation to take an appeal in the Wisconsin Telephone Case from Madison to Washington.

Assuming, therefore, that the Wisconsin high court ruling is final, telephone subscribers of the Badger state stand to lose approximately $6,000,000 on the basis of estimates of the impounded excess rate collections of the past few years (plus interest) over and above the rates authorized by the commission. A total refund of nearly $30 per customer was lost to the average Wisconsin telephone user, according to Calmer Browy, the commission's director. This estimate was based on the amount that would have been refunded to those who have subscribed to telephone service since 1931.

Browy pointed out that the total refund would have been approximately $1,000,000 under the 1934 rate reduction order and $2,500,000 under the 1936 order, plus $3,000,000 under Federal court injunctions pending the supreme court decision. There also would have been interest reaching as far back as 1932 on each sum.

ALL rate reductions which the commission ordered were held "unreasonable and unlawful" by the state supreme court in its recent decision. The case, begun under David E. Lilienthal, present member of the Tennessee Valley Authority, as a member of the Wisconsin Public Service Commission in 1931, involved three temporary rate reductions of 12½, 12½, and 10 per cent of company rates and a final reduction of 8 per cent. The company had set aside a $2,972,697 reserve for refunds to subscribers in event of a decision against it.

Lilienthal had been active in similar rate reduction procedure against the Illinois Bell Telephone Company and was the most active member of Wisconsin's 3-man public service commission in conduct of the investigation in Wisconsin.

After hearing testimony of nationally famous economists and others in a statewide investigation of rates and practices of the company instituted in the first term of former Governor Philip F. La Follette, the commission ordered a temporary reduction of 12½ per cent for the year beginning June 30, 1932, which was halted by Federal court injunction. A second 12½ per cent cut ordered for one year beginning August 1, 1933, likewise was stayed by Federal injunction.

During the year beginning July 31,

1933, the commission took a large amount of additional testimony and on July 5, 1934, ordered another rate reduction of 10 per cent for one year. At the time of this order, the company had presented practically none of its evidence, which was completed subsequently, and the commission on March 24, 1936, issued its final order reducing company exchange rates 8 per cent.

The company appealed the 1934 order and final order to Dane county circuit court, which set them aside on the ground that they were unlawful and unreasonable, and this was the action upheld by the high court in its 85-page decision on July 11th. The printed case contained over 7,000 pages.

THE supreme court held that the commission was without authority to issue a temporary order without giving the company a full hearing; that it had no authority to issue so-called "temporary" orders decreasing exchange rates until it had heard the company's evidence; and that the 1934 order was void because it failed to satisfy procedural requirements of the law.

Procedure of the commission was open to criticism in several respects and the weight of its findings impaired accordingly, but these proceedings were not in violation of law and did not deprive the company of its constitutional rights as it contended, the high court further ruled.

Principal criticism of the commission by the high court was on the ground that it commenced its study of the case with a general survey of depressed economic conditions existing at the time and concluded that rates should be reduced, thereafter trying to justify this conclusion rather than to consider dispassionately elements properly to be considered in rate making.

Two factors were involved in the controversy, the amount invested upon which the company was entitled to earn a reasonable return, and the actual net income of the company.

A commission finding that 8 per cent of the company's plant was "excess," not used and useful in rendering telephone service, reduced company valuation of the plant by $4,241,508, while the company claimed its excess plant valuation was only $117,972. The supreme court held that not more than 2 per cent of the property could be classed as excess.

ANOTHER controversy concerned prices for equipment in estimating reproduction value of the plant. The company insisted upon adoption of Western Electric prices as of the time of appraisal, lowest in the open market. The commission insisted that since these were depression years and business had fallen off, a large percentage of the Western Electric plant should be treated as excess, thus diminishing the amount upon which a reasonable profit could be estimated. The supreme court refused to hold with the commission on this and thus added $3,700,000 to the commission's appraisal of new reproduction cost of the company plant.

Another $1,000,000 was added to the rate base by the supreme court's ruling on interest to be allowed during the period of construction of its plant as compared with the commission's estimate. The court also held the commission unreasonable in its allotment of connection between local exchange and toll boards to toll without providing for change in toll rates prescribed by it.

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ON July 11th the farm bloc in the House of Representatives introduced its long-awaited measure to amend the wage-hour law through a bill (H. R. 7133) sponsored by Representative Barden, Democrat of North Carolina. The Barden bill, in addition to the amendments exempting agricultural labor as sought by the farm bloc, contains practically the same exemption of small telephone exchanges under provisions of the Fair Labor Standards Act as is contained in the administration's bill introduced by Representative Norton of New Jersey. This would exempt from Federal regulation "any switchboard operator, during any calendar year, employed at a public telephone exchange

which at all times during the preceding calendar year had less than 500 stations."

Because the agricultural labor provisions were not believed to be acceptable to the administration, the outcome of the Barden bill was clouded in doubt. By the same token, the farm bloc in the House has twice already shown its ability to block further progress on the Norton bill, which was blessed by the House Labor Committee.

By reason of the farm bloc's strength in the House (plus expected help from the regular Republican members), it was believed likely that the Barden bill might win the approval of that chamber if it could be brought out on the floor under a rule which would prevent its being tangled up by the opposition. Approval by the Senate in such an event was somewhat more doubtful, and most doubtful of all would be final approval by the President in view of his threats several weeks ago to veto any wage-hour legislation which went beyond the recommendations of the Wage-Hour Administrator.

* * * *

ANOTHER step taken by President Roosevelt, affecting the communications industries, was the special request to Congress for a supplemental appropriation of $210,000 for the FCC. This, of course, would be in addition to the regular appropriation of $1,838,175 which Congress has already appropriated for the fiscal year 1940. It was explained in testimony before the congressional appropriations subcommittee on July 14th that the new funds would be used principally for telephone regulation.

In both the preliminary (Walker) report and the final report of the FCC on the recently completed special telephone investigation, it was suggested that the FCC should set up a special division to take care of the telegraph industry which has heretofore been treated as a sort of regulatory stepchild, by reason of the pressure created by the younger but more troublesome problems of radio regulation.

While it is not likely that the commission would use the additional money (if appropriated) to establish such a formal division before Congress has a chance to act upon its recently submitted final report, the new funds may well be used to organize a nucleus or foundation for the eventual establishment of such a division if Congress does not register its opposition. Specifically, it was expected that the supplemental appropriation would be used to build up an especially assigned telephone staff of the FCC, not only in Washington, but also the field.

An example of the kind of work a special telephone rates and research division might perform, if and when established by the FCC, was seen in the decision of the FCC on July 12th to grant a petition of the Washington Department of Public Service for an investigation of the interstate rates of the Pacific Telephone & Telegraph Company.

The Washington commission is already engaged in a statewide investigation of that company by authority of a special fund voted by the recent session of the Washington legislature. The action of the FCC, therefore, will in effect bring about a joint intrastate-interstate rate investigation of the Pacific Telephone & Telegraph Company through an alliance of the state and Federal commissions, acting within their respective spheres.

* * * *

THE Federal Communications Commission on July 14th suspended, pending completion of hearings, its controversial rule requiring international broadcasting stations to transmit only programs "which will promote international good will, understanding, and coöperation."

Acting FCC Chairman Thad H. Brown said he was suspending the regulation because the fundamental issues in the controversy should be "considered and discussed without possibility of confusion arising from any ambiguity in or misinterpretation of language or phraseology."

"It cannot be emphasized too strongly," Mr. Brown said, "that the commission has no desire, or intention, of setting itself up as a board of censorship."

Financial News and Comment

By OWEN ELY

Sixth War Scare Subsides; Business and Security Prices Improve

THE Danzig war scare (sixth in the series of 1938-9 European crises) has seemingly subsided—for the present, at least—thanks, perhaps, to the rearmament program of the allied powers and the fighting spirit displayed by British leaders. Our business indices, which declined during January-May, recovered considerable ground in June, although the present shows a leveling-off tendency. The current outlook appears to be for continued moderate improvement in consumers goods industries during the summer, based on orders already placed by merchants and manufacturers.

Unfortunately the heavy industries are still somewhat lethargic, and unless current construction and munitions programs result in volume orders over the next month or so, it seems likely that the machine tool, steel, and equipment companies (some of which are still working on last year's accumulated bank of orders) may fail to share in this acceleration. This in turn might slow up the current gains in consumers goods business before the end of the year.

Our national economy cannot become thoroughly prosperous until private interests give whole-hearted assistance to general expansion plans, and at present the political situation remains a bar. We need more factory building, fewer costly PWA park and roadway projects. While the Gallup polls—highly accurate heretofore — raise strong doubt that Mr. Roosevelt can be reëlected, many business executives prefer to await more definite indications or developments before considering that they have a "green light" for constructive long-term planning. Hence we remain of the opinion that 1939, while perhaps laying a groundwork for an uprush in 1940, will probably register on future charts as a "sideways" period, comparable to 1923 and 1934.

For the past nine months the utility stocks have in general made a better showing than the market as a whole, apparently due to the improving political outlook. Recently, with the working out of a successful TVA compromise, this relative gain has been somewhat more rapid. However, a much higher price level is necessary to restore the group to the market position which it deserves on the basis of current earnings and dividends.

Refinancing Plans Should Be Expedited

THE advance in the high-grade bond market to all-time peak levels is being compared in some quarters to the inflated level of stocks in the summer of 1929. Current prices seem a product of the prolonged depression, the low level of building operations in recent years, the legislative obstacles to equity financing, the great demand for government bonds, and other factors which may never again combine to produce such an artificial condition of demand and supply in the money market. While there probably can be no rapid increase in money rates until political and business conditions show basic improvement, other factors might cause at least a

temporary upset in the market. In the past the market has sometimes been hurt by the failure of some large loan, and the current appearance of a huge 2½ per cent 15-year industrial bond offering has aroused some apprehension of a "buyers' strike" if this trend toward low coupon rates continues. With the market largely in institutional hands there is some danger that if one or two leading buyers should refuse a new issue, this might influence many others. The experience with two large issues last autumn—the Bethlehem Steel and Pure Oil offerings—is too recent to be forgotten, although a declining stock market was the major factor at that time.

The possibility of inflation in commodity prices also must not be overlooked, despite the many false alarms in the past. Great Britain has now embarked on a definitely inflationary trend, which may eventually affect the world level of commodity prices; and a sharp drop in sterling might eventually call for lowering the dollar to 50 cents, or other adjustments in our monetary set-up. The British bond market has already shown some marked weakness in gilt-edged governments.

Many utility systems still have refinancing programs to complete. In our opinion the current market offers a golden opportunity which may never again be available; and while the market should not be swamped with offerings, financial programs should be pushed forward without undue delay.

New Financing

As anticipated, financing in early July was negligible, the first week's offerings amounting to only about $1,000,000 municipals. The only important utility financing in the first half of July was the $5,000,000 Kansas Power Company first 4s of 1964, offered July 14th at 101½.

Other issues scheduled for July included the following: $5,650,000 California Water & Telephone first 4s of 1969 at 103½, and 28,000 shares of $1.50 preferred stock at $25; $25,000,000 Southern Bell Telephone 3s due 1979 at 105; and $26,500,000 Kansas Power & Light bonds.

Northern Natural Gas Company has advised the SEC that it proposes to sell privately $16,000,000 first "A" 3¼s due 1954 and to issue $6,000,000 unsecured 2⅛ per cent promissory notes to the Chase National Bank to evidence bank loans. Proceeds are to be used for refunding purposes, with the exception of $4,800,000 to be expended for pipe-line construction.

Northern Indiana Public Service Company has petitioned the public service commission of Indiana for permission to issue $45,000,000 bonds and $6,000,000 serial debentures or notes for refunding purposes, with an estimated annual interest saving of about $200,000. The bonds would probably have a 3¾ per cent coupon and be dated September 1st. The debentures would mature serially over a ten-year period with a coupon of 3½ per cent for the first five years and not over 4 per cent for the next five.

Refunding of $104,000,000 Columbia Gas & Electric debentures 5s may not occur until late in the year, in view of possible delays in proposed system changes.

General Water, Gas & Electric Company plans to issue a $1,000,000 6 per cent promissory note to International Utilities Corporation (the parent company) and a $1,200,000 3 per cent promissory note to the Chase Bank. Proceeds are to be used for the purchase of 24,142 shares of stock of California Water Service Company from Federal Water Service Corporation.

Bradford Electric Company plans to issue $550,000 first mortgage bonds due 1969, to retire a bank loan and provide for improvements.

Washington Gas Light Company has registered 362,588 shares of common stock, sale of which will be underwritten by the First Boston Corporation and Glore, Forgan & Co. It is planned to

DISTRIBUTION OF GROSS EARNINGS
COMBINED EARNINGS OF 177 OPERATING UTILITY
COMPANIES FOR YEAR 1938

CAPITALIZATION OUTSTANDING
COMBINED SECURITIES OF 177 OPERATING UTILITY
COMPANIES AS OF DECEMBER 31, 1938

From report of Securities and Exchange Commission

stabilize the price of the stock on the Washington stock exchange and elsewhere.

West Penn Power Company has notified holders of its 6 and 7 per cent preferred stocks that their shares will be redeemed February 1, 1940. The new 4½ per cent preferred stock was publicly offered July 18th, subject to subscription by preferred stockholders under the exchange offer.

Financial Statistics of Operating Utilities

THE SEC has issued a report summarizing the financial statistics for 1938 of 177 electric and gas operating utility companies in 33 registered holding company systems. Averages for all systems were as follows:

Number of times funded debt interest earned	2.48
Number of times charges and preferred dividends earned	1.52
Ratio gross income to capital and surplus	5.57
Interest rate on funded debt	4.40
Preferred dividend rate	6.04
Ratio of funded debt to net property account	54.47
Ratio capital and surplus to property account (including investments)	94.34
Depreciation—per cent of revenue	10.30
Depreciation—ratio to property account	1.72
Depreciation reserve—ratio to property account	10.05
Maintenance—ratio to revenues	5.81
Taxes—ratio to revenues	13.03

It is unfortunate that the table could not be extended to include Consolidated Edison, Commonwealth Edison, Detroit Edison, and other important companies which are not "holding company systems." The accompanying table presents selected data for some of the larger systems.

Name of Holding Company System	*Times Funded Debt Interest Earned*	*Times Fixed Charges & Preferred Dividends Earned*	*Funded Debt Interest Rate %*	*Preferred Stock Dividend Rate %*	*% Funded Debt of Net Property*	*% Depreciation of Operating Revenue*	*% Depreciation of Property*	*% Depreciation Reserve of Property*	*% Maintenance of Operating Revenue*	*% Taxes of Operating Revenue*
American Gas & Electric Company	2.93	1.68	3.92	6.39	54.04	13.62	2.42	12.00	5.36	12.57
American Power & Light Company	2.09	1.37	4.83	6.53	50.74	9.77	1.23	7.27	4.63	14.15
American Water Works & Electric Co., Inc.	2.94	1.56	4.26	6.53	56.35	10.00	1.79	12.41	7.76	11.61
Arkansas Natural Gas Corporation	1.98	1.84	4.52	...	52.15	23.21	3.70	27.13	3.89	12.48
Associated Gas & Electric Company	2.16	1.42	4.69	5.87	53.10	8.81	1.45	9.67	5.93	12.63
Cities Service Power & Light Company	2.55	1.53	4.57	6.15	58.49	8.44	1.51	9.67	5.31	12.58
Columbia Gas & Electric Corporation	4.16	1.95	3.36	4.90	40.96	10.62	2.16	13.32	6.43	11.99
Commonwealth & Southern Corp., The	2.23	1.35	4.40	5.58	53.32	10.75	1.47	6.38	6.06	13.02
Community Gas & Power Co.	2.23	1.46	4.55	5.59	55.71	6.31	1.01	8.90	4.38	13.39
Community Power & Light Company	1.79	1.55	6.30	6.56	75.52	8.51	2.00	11.17	4.17	10.81
Consolidated Electric & Gas Co.	1.87	1.65	4.89	6.14	59.02	7.05	1.57	14.52	3.80	9.06
Crescent Public Service Co.	1.80	1.20	4.94	6.00	64.32	7.96	1.45	12.01	5.31	8.34
Eastern Utilities Associates	3.09	2.28	3.82	6.00	77.64	9.82	2.63	30.19	3.98	10.06
Electric Power & Light Corporation	2.05	1.23	4.81	6.56	52.76	10.23	1.71	5.93	6.32	15.33
Engineers Public Service Company	2.18	1.25	4.55	5.91	55.35	10.87	1.74	8.86	6.92	12.10
Federal Water Service Corporation	2.20	1.71	4.89	...	77.54	16.84	3.28	19.02	1.90	10.24
Middle West Corporation, The	2.16	1.23	4.49	6.39	61.20	12.91	2.23	6.56	5.57	12.78
Midland United Company	1.64	1.04	5.14	6.38	63.69	9.01	1.86	2.71	5.20	10.38
National Power & Light Company	2.54	1.56	4.57	6.45	58.94	8.63	1.57	10.01	6.84	12.43
New England Power Assn.	3.83	2.56	3.58	6.00	47.26	6.93	1.27	14.15	4.88	12.71
New England Public Service Company	2.74	1.23	3.81	6.17	52.24	9.18	1.30	10.05	6.56	16.77
North American Company, The	2.58	1.68	4.19	5.50	60.82	12.13	2.20	16.69	6.11	13.58
North American Gas & Electric Company	1.06	0.85	5.50	7.00	74.72	6.48	0.65	12.06	7.37	9.42
North Continent Utilities Corporation	1.18	0.55	4.00	7.00	54.99	7.76	1.12	10.13	2.48	6.73
Penn Western Gas & Electric Company	1.88	1.16	4.75	6.78	63.28	11.72	1.98	10.32	5.93	12.64
Pennsylvania Gas & Electric Corp.	1.88	1.12	5.34	6.96	60.57	12.05	2.19	35.49	4.50	7.32
Peoples Light & Power Company	1.72	1.62	5.00	...	74.17	7.00	1.66	17.72	4.02	5.66
Southwestern Development Company	2.84	2.43	6.00	...	64.08	17.47	3.71	37.92	3.43	9.48
Standard Gas & Electric Company	3.27	1.70	3.90	5.96	46.85	9.93	1.58	9.53	6.16	15.41
United Gas Improvement Company, The	4.06	2.81	4.00	5.96	48.46	8.25	1.48	9.67	5.34	12.85
United Light & Power Company, The	2.76	1.94	4.09	6.46	57.20	10.26	2.23	15.35	5.44	12.39
Utilities Power & Light Corporation	1.41	0.90	4.85	6.54	61.81	11.07	1.43	8.77	6.25	12.47
Washington & Suburban Companies	2.21	1.66	4.57	5.03	48.05	5.31	1.18	4.19	5.00	7.60

Bar Group Seeks Revision of Securities Acts

A SPECIAL committee of the American Bar Association last month submitted a report to the annual convention recommending consolidation and revision of the three Federal laws which deal with the issuance and distribution of securities. The report stated:

> This committee is of the opinion that revision of the registration requirements of the securities act and exchange act, to eliminate the present duplication of information and filing, should be an important objective in the proposed consolidation of Federal securities laws. It believes that this objective can be achieved without affecting the protection now afforded to investors by abolishing the registration statement under the Securities Act as a separate document and retaining the prospectus alone, reserving to the commission the power to require, in the case of issuers having no securities listed on an exchange, or in other appropriate instances, the filing of additional information comparable to or supplementary to that required with respect to listed securities. . . .
>
> Amendment of all three acts to provide immunity from civil liability for acts or omissions in good faith in reliance on an opinion released by the commission would make possible far greater coöperation between business men, accountants, and lawyers, on the one hand, and the commission on the other in simplifying information filed under each act.

Concerning the 20-day waiting period between filing of an issue and its offering, the committee stated:

> It is notorious that the prohibition against transactions in a security during the waiting period is not observed, and that the practice of "jumping the gun" is widespread. Much can be said for legislation designed to remove the prohibition against solicitation during the waiting period. If this were done, however, it should be further provided that no sale or attempted sale should result in an enforceable obligation unless the transaction has been confirmed within a reasonable time after the registration statement (or the prospectus alone) has become effective and the prospectus has been furnished the investor.

The committee also suggested simplification of present regulations regarding price stabilization, solicitation of proxies, filing of information, etc.

Corporate News

THE Indiana Public Service Commission has approved the merger of various electric light properties scattered over 12 central Indiana counties, involving the sale of all power properties of the Traction, Light & Power Company to the Central Indiana Power Company and the Public Service Company of Indiana, which already operate in the same territory.

United Corporation invested $2,446,712 in stocks of nonutility companies in the period March 17th to June 30th. Most of the buying was done during the war-scare period of late March and early April, purchases including the following:

1,600	American Can
2,000	Chrysler
2,000	duPont
900	Eastman Kodak
3,700	General Electric
1,600	General Mills
3,000	General Motors
2,300	International Harvester
2,600	International Nickel
3,800	Phelps Dodge
2,634	Procter & Gamble
1,900	Sears Roebuck
4,000	Union Carbide
1,900	United Fruit
3,000	Woolworth

The SEC last March approved the company's program for investing $8,000,000 during the six months ended September 13th, to diversify holdings. It is understood that the company did virtually no buying in the two months ended July 6th, but according to *The New York Times* the management at that time planned to reënter the market soon.

While the utility industry has been relatively free of labor troubles recently, Pacific Gas & Electric Company has been ordered by NLRB to stop alleged interference with employee organization and to hold a secret election to decide whether employees should be represented by an employees' union or a CIO organization. A previous vote favored the former, but was set aside due to CIO accusations of coercion.

The "down payment" of $3,000,000 by Associated Gas & Electric to the Bureau of Internal Revenue as part of its $8,700,000 tax settlement (the government had claimed $80,000,000) has resulted in release of system property which had been attached to cover tax claims. However, the government is continuing an attachment against securities valued at $22,000,000, which is said to include $12,000,000 Metropolitan Edison Corporation 5½s due 1956.

The tax settlement should help pave the way for system refunding operations, which might be further expedited by progress with the integration program. Associated recently sold scattered properties with an aggregate value of over $3,000,000 (principally in the Tennessee area). It has already offered to sell its Carolina properties and is understood to be willing to give up the Florida companies. It is also expected to dispose of its properties in the Middle West and Southwest which have annual gross revenues of $6,000,000. Eventually major operations probably will be limited to the states of New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, and West Virginia.

Associated Gas is still having some rate difficulties, particularly in Pennsylvania, where the public utility commission ordered cuts amounting to some $1,230,000 per annum (with further reductions possible). The system continues barely to cover fixed charges but, with power sales gaining, modest improvement seems in prospect.

Union Electric Company of Missouri has been declared a holding company by the SEC and its plea that it should not be subject to the Utility Act rejected. The company is a $250,000,000 subsidiary of North American Company, and had argued that with that status it was already subject to regulation under most provisions of the act. The decision is considered as establishing a precedent.

Metropolitan Edison Company has been authorized by the FPC to acquire all the interstate electric facilities of Northern Pennsylvania Power Company. Both are Associated Gas subsidiaries.

Competitive Bidding

RENEWED agitation has appeared recently for competitive bidding both in railroad and utility financing. Morgan Stanley and Kuhn, Loeb have again refused to coöperate for competitive bidding on a small railroad offering. A more serious issue was the last minute effort to have the flotation of $25,000,000 Southern Bell Telephone debentures (scheduled for July 20th by Morgan Stanley and associates) opened for public bidding. The Louisiana Public Service Commission wired officials of Southern Bell suggesting competitive tenders; the Tennessee commission was understood to have asked the SEC to investigate public bidding, and a small committee of American Telephone stockholders was formed to urge competitive bidding. Joseph W. Schneider, director of the Kentucky Division of Securities, was also reported to have forwarded a protest on behalf of several local bond dealers.

Counsel for Southern Bell Telephone was reported to have advised the company that the several state commissions have no jurisdiction over the immediate issue involved. President Gifford of American Telephone indicated sometime ago that, while he has an open mind on the subject, he would prefer to see a thorough test of competitive bidding before finally adopting that method for his system. The FCC in a recent report to Congress stated its belief that competitive bidding would have saved money for the Bell system since 1906. The telephone company, however, indicated its opinion that the mishandling of a single major issue might more than offset the savings obtainable through competitive bidding on a large number of other issues.

EARNINGS STATEMENTS OF LEADING UTILITY SYSTEMS

	No. of Months Included	End of Period	System Earnings per Share (a) Last Period	Previous Period	Per Cent Increase	Per Cent Decrease
Electric and Gas						
American Gas & Electric	12	May 31 (b)	$2.38	$2.24	6%	..
American Power & Light (Pfd.)	12	May 31	5.12	6.05	..	15%
American Water Works	12	Mar. 31 (c)	.48	.83	..	42
Boston Edison	12	Mar. 31 (c)	8.84	8.44	4	..
Columbia Gas & Electric	12	Mar. 31 (c)	.39	.59	..	34
Commonwealth Edison	12	Mar. 21	2.30(g)	2.16(g)	6	..
Commonwealth & Southern (Pfd.)	12	May 31 (b)	9.43	8.53	10	..
Consolidated Edison, N. Y.	12	Mar. 31 (c)	2.08(j)	2.23	..	7
Cons. Gas of Baltimore	12	May 31	4.33	4.24	2	..
Detroit Edison	12	May 31	7.51	6.08	24	..
Elec. Power & Lt. (1st Pfd.)	12	May 31	5.72	9.66	..	41
Engineers Public Service	12	May 31	1.28(h)	.69	..	..
Inter. Hydro-Electric (Pfd.)	12	Mar. 31 (c)	5.36	13.03	..	59
Long Island Lighting (Pfd.)	12	Mar. 31 (c)	4.34	5.06	..	14
Middle West Corp.	3	Mar. 31	.24	.11	118	..
National Power & Light	12	May 31 (b)	1.15	1.28	..	10
Niagara Hudson Power	12	Mar. 31 (c)	.53	.70	..	24
North American Company	12	Mar. 31	1.61	1.77	..	9
Pacific Gas & Electric	12	Mar. 31	2.53	2.68	..	5
Public Service Corp. of N. J.	12	May 31 (b)	2.66	2.35	13	..
Southern California Edison	12	Mar. 31 (c)	2.18	2.10	4	..
Standard Gas & Elec. (Pr. Pfd.)	12	Mar. 31 (c)	4.63	7.41	..	38
United Gas Improvement	12	Mar. 31 (c)	1.00	1.07	..	7
United Light & Power (Pfd.)	12	May 31	5.85	7.58	..	23
Gas Companies						
American Light & Traction	12	May 31	1.57	1.59	..	1
Brooklyn Union Gas	12	Mar. 31 (c)	2.78	2.23	24	..
Lone Star Gas	12	Mar. 31 (c)	1.03	.97	6	..
Pacific Lighting	12	Mar. 31	4.79	3.32	44	..
Peoples Gas Light & Coke	12	Mar. 31	2.95(f)	2.99(f)	..	1
United Gas Corp. (1st Pfd.)	12	May 31 (b)	10.44	18.75	..	45
Telephone and Telegraph						
American Tel. & Tel.	12	May 31	8.99	8.65	4	..
General Telephone	12	Mar. 31	1.71(e)	1.62(e)	6	..
Western Union Telegraph (i)	12	Mar. 31 (c)	D1.32	.77	..	..
Traction Companies						
Greyhound Corp.	12	Mar. 31 (c)	2.01	1.72	17	..
Twin City Rapid Transit	3	Mar. 31	.33	.01	..	..
Systems outside United States						
American & Foreign Pwr. (Pfd.)	12	Mar. 31 (c)	6.85	6.88	..	..
Inter. Tel. & Tel. (d)	3	Mar. 31	.19	.36	..	47

D—Deficit.

(a) On common stock, unless otherwise indicated following name of company; in some cases Federal surtax not deducted.
(b) Data also available for month indicated.
(c) Data also available for quarter indicated.
(d) Excludes Spanish subsidiaries and Postal Tel. & Tel. Co.
(e) Includes earnings of General Telephone Tri Corp. and subsidiaries from August 30, 1938 (date of acquisition).
(f) Before reservation for rate litigation, $6.77 compared with $3.38.
(g) Based on adjusted consolidated net income.
(h) Excluding loss of Puget Sound Power & Light Company.
(i) For five months ended May 31st net loss was $667,103 compared with $1,617,604 last year; for month of May net income was $126,529 compared with a net loss of $323,775 last year.
(j) For twelve months ended April 30th the parent company earned $2.12.

What Others Think

How Sound Is the Municipal Revenue Bond?

Is the municipal revenue bond a good buy? Of course, such a broad question cannot be answered categorically. Without mentioning any particular municipal offering, however, a pretty good general appraisal of this new instrument of municipal financing, now employed so largely for the promotion of public ownership of utilities, appeared in the July 10th issue of *Barron's*, the national financial weekly. The article was written by F. J. McDiarmid who, many FORTNIGHTLY readers will readily recall, is an investment analyst employed by one of the leading life insurance companies of the United States.

Mr. McDiarmid's answer to the question about the soundness of revenue bonds could be summed up in three brief but rather inconclusive words, "yes and no." The author placed great emphasis upon the fact that municipal revenue bond issues are still pretty much of an experiment. If you are equipped to make a judicious investigation, Mr. McDiarmid believes that you can find some worth-while investments in this field. But if you are not in a position to know exactly what you are doing, it is a different story entirely. The author concludes on this point as follows:

> The wealth, stability, and general credit record of the issuing municipality should be a final and very important factor in determining whether or not to buy a revenue bond. These bonds by their very nature make their greatest appeal to municipalities of secondary credit standing; to municipalities which are already in debt nearly to their legal limit, or whose general credit does not invite the issuance of general obligation bonds. To obtain the information necessary for the intelligent selection of revenue bonds is frequently a troublesome and laborious task which is not made easier by the fact that a large proportion of the issuing communities are small, obscure places where the fast trains just whistle and go right on through. However, those unable to undertake this task are advised to leave such bonds strictly alone, since they are still a highly experimental field for investment.

Although still an experiment, the municipal revenue bond promises to become an important instrument of public finance in the United States. Practically all of the municipal financing in the TVA area for the purchase of electric distribution systems is or will be of this character. In the year 1937, 32 per cent of all municipal obligations sold were revenue bonds. This figure dropped to 17 per cent in 1938, but will probably pick up with the completion of TVA negotiations and other Federal power project programs.

MR. McDiarmid outlined a number of features of the municipal revenue bonds which are likely to appeal to the investor. First of all, the yield is higher than is usually obtainable from a tax obligation bond issued by a municipality of similar credit standing. Revenue bonds are, so far at least, tax free. Finally, practically all of them make provision for complete repayment out of earnings, with the amortization terms not exceeding thirty years: This is said to give the revenue bond an advantage of financial strength not generally found in private utility bonds.

The principal disadvantage of the municipal revenue bond can be traced to its newness and the uncertainty that still surrounds its practice. Because only a small number of such issues have been outstanding for any length of time, there is no experience from which to draw reliable conclusions.

There is the political question mark, for example. Mr. McDiarmid cited an

instance surrounding a sale of sewer revenue bonds in a midwestern city about a year ago. The purpose of the financing was sound enough and the fact that PWA was matching the city's bonds with a grant at a ratio of about 4 to 5 made it, if anything, more attractive to the investor.

Yet the city council high-handedly passed over the highest bidder in order to favor a syndicate which contained a couple of local firms. In addition to this disturbing exhibition of political favoritism, Mr. McDiarmid stated:

> A more potent objection to the process through which this sewer bond issue saw the light of day lies in the fact that the issuance of these bonds, which, incidentally, just about doubled the bonded debt of this city, was approved by the city council, fourteen men sitting around a table, in a single session. The citizens at large, who will pay the freight in the form of a surcharge on their water bills over the next thirty years, had no direct say in the matter. Through such a process it is entirely possible for a municipality to be saddled with a large amount of debt, to finance an enterprise of doubtful merit. This possibility is not entirely removed by obtaining popular approval of such a bond issue by vote of the people, as is nearly always done with general obligation bonds. However, such a vote does fix the responsibility for the issuance of the bonds directly on the people themselves. Repudiation at a later date would be a more awkward and painful procedure.
>
> The average rate of interest being paid by the city to raise this money was 3.15 per cent. Earlier in the same year this city, whose credit is among the highest, had sold general obligation school bonds, having a somewhat shorter average maturity it is true, at a mean rate of only 1.85 per cent. Had the sewer bonds, in addition to being supported by a pledge of revenues, been made general obligation bonds as well, the city could probably have borrowed at a ¾ per cent lower rate. Presumably the city has every intention of honoring its obligations, both direct and implied, in connection with these bonds. Why then should it not have obtained the lower rate of interest by attaching to these bonds its unconditional guaranty?

THESE appear to be substantial arguments, from the taxpayer's viewpoint, against the use of revenue bonds which raise a question as to why such bonds are being issued in large and increasing quantities. Generally it is because the particular municipality has nearly or entirely exhausted its statutory or constitutional debt limitation. Under such circumstances, it may be inconvenient or even politically impractical to obtain an increase in the debt limit through legislation or referendum—so as to legalize the issuance of additional general obligation bonds.

The revenue bond, on the other hand, has considerable political appeal in that there seems to be a widespread notion among voters and taxpayers that, because these bonds amortize themselves out of their own earnings, they cost the public nothing. Mr. McDiarmid reminds us that there are always people who are interested, "not always for altruistic reasons," in getting utility enterprises started, and the way for public ownership promotion has undoubtedly been made easier by the fact that the revenue bond issue may need only the vote of a city council, as distinguished from the risk of an election.

From the investor's point of view this tendency of the revenue bond to encourage financial irresponsibility requires the most serious consideration. After all, the investor serves his purpose best by adopting a cold-blooded approach to such matters without bias for or against political or economic theories which may be involved in the municipal project.

Hence Mr. McDiarmid advises the investor that "issues put out to finance necessary public services are to be preferred over bonds sold for more marginal or fanciful purposes." Thus, if the proposed issue is to finance a municipality's expansion or acquisition of an electric or water utility service having behind it a successful record of operation, the bond buyer has little to worry about. Construction of an entirely new project, however, requires more careful scrutiny. The author feels that of all such projects a water system is probably "the safest bet." Sewer revenue bonds are a more recent development and their distribution may depend upon whether it will be found practical to enforce payment by discontinuing water service

San Francisco Chronicle

SAN FRANCISCO PASSES ANOTHER HITCHHIKER

upon which the sewer project has become a surcharge.

BRIDGE revenue bonds, says Mr. McDiarmid, have to be judged on their own merits. Some of them built near the great cities have panned out splendidly, while others supported solely by bridge revenues have flopped miserably. The author seems to be a little skeptical about bridge revenue bonds at this time, because he fails to see why, if such ventures are sound in the first place, they should not be supported by general obligation issues.

Even more open to criticism are revenue bond issues brought out for fanciful projects or for municipal services in excess of municipal needs. Mr. McDiarmid says on this point:

> The investor in revenue bonds should make it his business to learn the circumstances back of the project being financed. Such projects are not always based on the unanimous wish of the community, or even of a majority of the voters. Sometimes a high-powered salesman of Diesel engines and generating equipment sells the city or town council a bill of goods, and sometimes the roving representative of a bond house knows the right wires to pull to bring forth a bond issue. (The spreads on small municipal bond deals are said to be unusually juicy.) In some cases the desire of the community to get its full share of easy money from Washington may tempt it to build a waterworks plant apparently designed to rival in magnificence the state capitol.
>
> The bond buyer should take care to see that the community is getting value received for its money and that it thoroughly believes that it is getting value received. When a project financed by revenue bonds is railroaded through against the better judgment of a substantial part of the community, the moral obligation of the community to see the bonds through may be undermined.

The author gave other instances of questionably planned projects which have been financed by municipal revenue bonds, such as that of a southern Indiana town which brought out an issue of bonds to be supported entirely from the revenues of a swimming pool and from revenues of a sight-seers' gallery constructed underneath the pool. A cold summer might wreck the bondholders under such circumstances.

THE well-known editor of *The Texas Weekly*, Peter Molyneaux, reports in that publication a recent experience which a friend of his had with municipal revenue bonds in a near-by state. The friend had been offered some of these bonds, issued by a town of about 7,000 people. They were part of a $300,000 issue which had been voted to build a municipal power and lighting system. The town had a good record for meeting obligations and the bonds were offered at an attractive price. But the broker could not or would not provide information requested by the careful investor; so Editor Molyneaux's friend undertook an investigation of his own.

The first thing he found out was that a privately owned utility was already existing in the town, with a franchise still having nine years to run. An accountant's report on the business of this private company recorded the latest gross annual income from all sources at $91,203. Yet the broker who had offered the bonds had told the editor's friend that an "engineer's report" had estimated gross income of the municipal plant for the first year of its operation at $172,800, or nearly twice the income of the private company. The town had no large consumers, being in an agricultural district, and no immediate prospects of any. Its income was derived from about 1,600 families in the town.

The next point of inquiry was to ascertain what the private utility proposed to do when the municipality started to compete. The likeliest prospect appeared to be that the competitors would share the business, thereby halving the gross income at approximately $45,600 each. This would give the municipal plant about one-fourth of the engineer's estimate.

In short, the independent investigation convinced this Texas investor that even with efficient management the municipal plant would find it impossible to service $300,000 worth of bonds from such an income, after paying operating and maintenance costs. Of course, foreclosure in event of default would hardly be satisfactory, because if the municipality could not operate profitably the bondholders could not either. Then there would be legal complications. In Texas, for example, the courts have decided that where a municipality has paid over to bondholders all net revenues from a power plant, the latter are not entitled to foreclose.

EDITOR Molyneaux commented upon other facts disclosed in this inquiry as follows:

> The first was that the people of the town were impelled to vote the bonds for the power plant on the basis of the report of this engineer. And the second is that there is a class of brokers who are seeking municipal bonds of this kind to pass on to unsuspecting investors, since the Securities and Exchange Commission's regulations have had the effect of curtailing their operations.

Let me hasten to say that I am not suggesting that all securities issued by municipalities to build power plants are of this character. But I am saying that there is no easy way for the average investor to tell the difference between a sound and an unsound security of this kind. I do not know whether municipal securities of this kind could be placed under the jurisdiction of the Securities and Exchange Commission constitutionally, but I certainly think such securities ought to be subjected to adequate regulation by some competent authority, for they are increasing daily. I would not go so far as to say that a certain type of engineers and a certain type of brokers have entered into an alliance to carry on a racket of which the small investors and the municipalities are both the victims. But there is some ground upon which to base such a conclusion.

Mr. Molyneaux conceded that the failure in many instances of private power companies to retain the confidence of the people has provided the opportunity for such projects. But he warned that the people, both as citizens and as investors, would be the victim if careless financing of municipal projects under the encouragement of public ownership is permitted.

—F. X. W.

BUYING MUNICIPAL REVENUE BONDS. By F. J. McDiarmid. *Barron's*. July 10, 1939.

A NEW RACKET IN MUNICIPAL BONDS? By Peter Molyneaux. *The Texas Weekly*. July 8, 1939.

Mr. Carmody Tackles a Tartar

WHATEVER private utility executives (telephone as well as electric power) may think of him, John Michael Carmody, the blunt and towering Pennsylvania Irishman, has established an enviable reputation in Washington as a conscientious public spender. And as anyone knows who reads the newspapers these days, you have got to be really good to earn that kind of a reputation in Washington. It isn't as easy as it looks, spending $140,000,000 in the space of twelve months—not if you are to be held accountable for dispensing this money in rural loans which would stand up under some semblance of bank examination.

Yet that is what Mr. Carmody is supposed to have done during the fiscal year of 1939 just completed. Then he closed his desk at the Rural Electrification Administration and stepped into his new and more important rôle of bossing Uncle Sam's entire public construction program. Whether these rural electrification loans will continue to be self-liquidating, and whether the economical rural lines which were built with them will continue to prove satisfactory after the years have faded the novelty of rural electrification under Federal pressure, remains to be seen.

Just the same, few will deny that from the viewpoint of fiscal administration, as such matters are handled nowadays by the Federal government, the job John Carmody did at REA merited the President's attention. In any event, Carmody's record did attract the President's attention, as we know, at a time when the most experienced Washington observers were looking in almost every other direction for a clue to the identity of the new Federal Works Administrator.

An analysis of the job thus created for Carmody and his fitness for it was recently attempted in *The Washington Post* (Sunday, July 9th) by the special feature writer, Christine Sadler. The Sadler article sums up the main subunits which have been fused into the new Federal Works Agency as follows:

> The unimpeachable Bureau of Public Roads from the Department of Agriculture, with $191,000,000 to go on this year, and road or grade-crossing projects in nearly every county of the nation.
>
> The public building division from the Treasury's procurement division, which gets approximately $60,000,000 annually with which to put up postoffices and courthouses, which supervises Federal building in the District of Columbia, and which takes on building jobs for other government agencies.
>
> The giant PWA from the Department of Interior, beloved brain-child of Secretary Ickes. With no new money this year—but

much still expected—the PWA has approximately $2,000,000,000 worth of work on hand, enough to keep it going for four or five more years without additional pump-priming.

The slow-moving United States Housing Authority, which has operated independently and is just beginning to see results from a $8,000,000 slum-clearance program authorized last year. The Wagner-Steagall Act which would give USHA the same amount again and eliminate some of the technicalities holding it back has been partially approved by the present Congress.

The political fireball known as WPA, which Harry Hopkins sired to meet the relief needs of the depression and which lingers on with a $1,477,000,000 bank account and some 2,400,000 able-bodied relief clients to give it life. Plans on everything from adult education to municipal flower gardens can be found in its ever-active files.

This is surely a vast and oddly assorted allotment, but for fifteen years experts have been saying that if Uncle Sam is to continue outbuilding the Romans—and he is—he should get all his building divisions together and find a trouble-shooting engineer to head them.

CARMODY is probably an engineer more by absorption than formal training. However, his background indicates just the type of versatility which may be requisite for carrying on as the Federal government's master builder. Born and raised in northwest Pennsylvania, and educated in New York state and the Middle West, Carmody began life as a clerk and bookkeeper with various structural steel concerns. From there he went into the ladies' garment industry, and next into the bituminous coal industry. He emerged in 1923 as the editor of *Coal Age*, a trade magazine of the McGraw Hill Publishing Company, which sent him to Russia in 1931 to look over industrial progress among the Soviets.

Carmody's official career, which began in 1933, is as varied as his private business background. First he became chairman of the Bituminous Coal Labor Board, then chief engineer of the Civil Works Administration (FERA), and a member of the National Mediation Board, a member of the National Labor Relations Board, and in 1936 was appointed Administrator of the REA.

The Sadler article mentions an interview with Carmody at his new office in the old Interior building in Washington: "As I see it," Carmody said, "I have to translate plans into dollars and dollars into payroll hours, payroll hours into industrial and commercial activity, and these into general community happiness. That's the goal, really—community happiness. If that is not achieved the whole thing will be a failure." It continued:

Surrounded by posters brought over from REA and maps with innumerable pins in them, Carmody is studying his set-up. By patient learning, he declared, he hopes to integrate PBA, PRA, PWA, WPA, and USHA into an effective organization.

He looks on the job as "no fight at all." Everybody's looking for efficiency, he said, and that's what they're going to get. He thinks the dissension days concerning most of the works program are over—even for the WPA. Eventually, he believes, even the Federal theater will come back.

"I am sorry it was cut out and think it sometime will come back in one form or another. I saw only one of its plays, but that was a good one. I saw 'Power.' It had propaganda in it, yes—but it was good propaganda. It told people what they should have been knowing all the time."

Most of all, Mr. Carmody hopes to work out a program that will please industry. As a business man who has tackled jobs in every state in the Union and knows what plant managers and company heads are up against, he sees no reason why it cannot be done. His main contribution in this direction will be long-range planning.

Quoting Mr. Carmody directly, the article continued:

"It can be done. All these divisions know ahead of time what they are going to be doing and the materials to be used in their programs. We can't place orders far in advance, but we can let them know it's coming.

"We can translate the whole thing into man-hours of labor and relate it to the present structure of industry, because everything that is used in a works program is processed somewhere in industry.

"Our planning at REA, for instance, was in great detail for a period of eighteen months ahead. We have said, as an illustration, that in December of next year we would be purchasing a certain number of poles and that knowledge was passed on to industry.

"HOLD UP AGAIN BOYS—TH' BOSS THINKS IT WOULD LOOK BETTER OVER IN THIS CORNER"

"I know of no greater service we could render to industry than to do precisely that type of planning here. And that applies, not only to industry, but to the whole working population," he declared.

While not committing himself on the permanency of divisions dealing with relief labor, declaring they will be subject to revisions "that grow out of our economic processes," Carmody is certain "there will continue to be something of a public works program for a long time.

"I believe the public accepts this and is aware of the new values that can thus be created."

THE new Federal Works Administrator is reported to be planning no large over-all staff. He will maintain a small coördinated unit by which FWA will work through and with the existing agencies now under its control, rather than seek to duplicate their work. Carmody realizes that there must be much "trying and fitting" before all parts of FWA are integrated and a new building to house them might not even be a good idea at this time.

Although Carmody has become well known for obvious reasons throughout the utility industries during recent years, his appointment to the prize post as head of the newly created Federal Works Agency caused quite a surprise in some quarters. Carmody was not what one would call a figure of national prominence and even in political circles of the

New Deal was not particularly well known. General Hugh Johnson, in his syndicated column, for example, asked quite bluntly why President Roosevelt dug up such an obscure appointee for such an important post. Johnson could recall only that Carmody was for a short time a member of the NLRB, a fact which hardly improved the general's impression of the new Administrator.

Another usually omniscient syndicated column—the Washington Merry-Go-Round, by Pearson and Allen — didn't even remember that Carmody had been on the NLRB, and went so far as to inform one of its readers that General Johnson had been in error in saying so.

Be that as it may; the new Administrator is well enough known in industrial circles and, if he carries all the fire and pep into his new job that he put into the REA, it is a safe bet that he won't remain unknown long throughout the entire country. "Two-fisted, dynamic, and a wheel horse for efficiency," is the way the Sadler article sums up the boss of the government's newest and biggest agency, FWA.

Discrepancies in the TVA Investigating Committee Report

ALTHOUGH it was as far back as April, 1939, that the joint committee investigating TVA submitted its majority and minority reports to Congress, analytical articles on the subject continue to appear. One very interesting interpretation was published in the May issue of *The Journal of Land & Public Utility Economics,* under the highly qualified and obviously unbiased authorship of D. L. Marlett, assistant executive officer of the Illinois Commerce Commission and a lecturer on the subject of public utilities at Northwestern University.

Mr. Marlett reviewed the various findings in the majority report in the light of the evidence, especially the report of the TVA investigating committee's own engineering staff. Most of this would scarcely be new to FORTNIGHTLY readers, but Mr. Marlett's discussion of the "yardstick" brings to light one facet of this committee report which has not received very wide attention.

He observed that the congressional committee received two apparently conflicting reports and proceeded to adopt the conclusion of the report that the *retail* electric rates of the authority provided a legitimate and fair yardstick for measuring the fairness of private electric utility rates.

The basis for this conclusion of the committee was the report of Leland Olds, then executive secretary of the New York State Power Authority who has since been elevated to the membership of the Federal Power Commission. Mr. Olds predicated his argument for the need of a yardstick upon the somewhat usual allegations about the "breakdown of regulation" and the need for some instrument to cut through the "vicious circle" of high rates and low consumption, which he found to result from development of the electric industry with a minimum of public ownership.

THE committee decided to string along with the Olds' conclusion because it found that TVA wholesale rates were in line approximately with private wholesale charges, thereby making charges of unfair subsidy of negligible importance. The committee likewise brushed aside as inconsequential other objections as to unfair advantages by way of subsidy or accounting practices enjoyed by the municipal distribution systems in comparison with the private utility plants.

Referring to the committee's engineering report, Mr. Marlett continued:

> The engineering report contains recommendations concerning the yardstick which are not in harmony with the above conclusions. The report points out that TVA's operating and cost conditions and marketing policies differ substantially from those of private companies and that the questions—yardstick where? yardstick when? and yardstick under what conditions?—would have to be satisfactorily answered and the differences adjusted before the authority's electric rates would be considered an exact yardstick of private ownership. The engineering report recommends that use of the term "yardstick" in connection with TVA rates should be abandoned entirely and that the committee should confine its investigation in this field to determining whether the authority's costs have been reasonably incurred and whether the electric rates will yield revenues to cover those costs in such manner as to distribute them equitably as between taxpayers of the nation and ratepayers of the Tennessee valley. Thus, if full power costs are properly covered by revenues, then TVA's rates are a true yardstick, not of equitable private rates, but of accomplishments of public ownership under conditions prevailing in the Tennessee valley.

The congressional committee's report avoided a detailed review of the relation between TVA and the private power industry, because of the compromise purchase negotiations which were opened earlier this year but whose fate trembled in the balance even as these lines were written as a result of disagreement in Congress over enabling legislation. The balance of Mr. Marlett's article reviewed the committee's findings on TVA's difficulty with the General Accounting Office and internal administrative organization.

THE TVA INVESTIGATION. By D. L. Marlett. *The Journal of Land & Public Utility Economics.* May, 1939.

The FPC Announces an Electric Rate Book

THE Federal Power Commission announced on June 25th that it would begin publication shortly of the National Electric Rate Book showing residential, commercial, and industrial electric rate schedules of all publicly and privately owned electric utilities in all communities of 1,000 population or more in the United States. The rate book will present, in standardized form and by states, some 15,000 rate schedules under which electric service is sold in more than 10,000 communities in every state in the Union. Acting chairman Clyde L. Seavey, in announcing the forthcoming publication, stated:

> The National Electric Rate Book has been prepared in response to numerous and widespread requests from both public and private sources for a compilation of the scope and character of this publication. Accurate information as to rates charged for electric service to all classes of customers by all classes of electric utilities is of vital interest to the public, electric utility executives, chambers of commerce, regulatory bodies, banking and investment companies, libraries, and business men. The data to be presented in the National Electric Rate Book will make it the most authoritative and comprehensive reference book on residential, commercial, and industrial rates yet issued.
>
> For a number of years the Federal Power Commission has published annually, by states, reports showing residential electric rates in the form of typical net monthly bills in all communities of 250 or more population having electric service, in every part of the United States, and typical net monthly bills for commercial light, commercial power, and industrial service in larger communities. The rate book, while complete in itself, will not supplant, but will be a companion to these publications. The typical monthly bill reports are computations, in dollars and cents, made from rate schedules. The rate book is a compilation of the actual rate schedules in abstract form. Thus, the typical bill reports will serve as a guide and index to the levels and trends of electric rates, and the rate book will serve as a guide and index to the actual rate schedules in effect throughout the country.

The electric rate schedules abstracted in the rate book will be those for all privately and publicly owned electric utilities operating in the approximately 7,000 communities of 1,000 population

or more throughout the country, showing, by states, and for each utility operating therein, the communities served by individual utilities, the rates charged and type of customer to which these rates are applicable, and the effective date of the rate schedule. All rates for general service to homes, offices, business establishments, and manufacturing plants are shown, including such special rates for refrigeration, heating, and cooking, etc., as are available. In addition, minimum monthly bills, discounts, and other factors affecting the price charged are all abstracted in standard form. The abstracts are complete as to important provisions so that bills may be computed accurately under each rate. The rate book also contains, by reference, the rate schedules of 3,000 smaller communities in which rate schedules are the same as those in communities of 1,000 or more population.

Containing approximately 1,500 pages, the rate book will be published by states, in loose-leaf form with a flexible binder, and will be offered for sale at $15 for the complete 48 states, the purchase price to include all supplements issued to January 1, 1940. After that date, purchasers may keep the book up to date by subscribing for supplements, to be issued periodically, for $7.50 per year.

A compilation of this nature has been long planned by the Federal Power Commission. Its publication at this time has been made possible by the collaboration of the Works Progress Administration, which provided much of the clerical assistance required for the undertaking as a work-relief project. The staff furnished by the Works Progress Administration worked under the direction and supervision of members of the Federal Power Commission's staff, and the abstracts prepared by the project workers were reviewed by members of the commission's staff before being sent to the utilities for approval prior to publication.

City Managers Report Lower Utility Rates

IN the 1939 Municipal Year Book, published by the International City Managers' Association, there appears a report showing a pronounced trend toward lower utility rates. While this is a generally known fact, supported by industrial and Federal statistics, the corroboration from the city managers is not without its own significance.

The report shows utility rate decreases totaling nearly $4,000,000 in six states. Furthermore, it is noted that this downward trend has continued without any particular pressure by way of special legislation. If anything, it is a compliment to the effectiveness of state commission regulation.

Reductions cited include about $1,000,000 in Virginia utility rates, and $600,000 in intrastate telephone rates in Pennsylvania. Major electric rate reductions are reported in the following amounts: $350,000 in Indiana; $272,000 in Arkansas; $838,000 in North Carolina; and $300,000 in South Carolina. The principal municipal electric rate reduction noted was the $350,000 a year cut for Louisville, Ky., and vicinity.

Of course, this report does not purport to be comprehensive and informed followers of utility affairs may readily recall even larger rate reductions not listed.

The report is worthy of notice, however, in that it comes from a group which has in previous years been most articulate about the prevalence of high utility rates in American cities.

The March of Events

TVA Buying Bill Adopted

CONGRESS on July 14th gave its approval to legislation enabling the Tennessee Valley Authority to buy from the Commonwealth & Southern Corporation utility properties in three southern states.

The House adopted by a vote of 208 to 145 a conference report embodying a compromise bill which Republicans characterized as "a surrender" by the House conferees to Senator Norris of Nebraska, chief Senate conferee and "father of the TVA."

The President previously had indicated that the compromise was satisfactory and his signature was expected.

The compromise reduced the $100,000,000 bond issue proposed by the Senate bill to $61,500,000, the House figure, and earmarked the purposes for which the proceeds could be used. The bill set aside $46,000,000 as the TVA's share of the $78,600,000 contract for public purchase of Commonwealth & Southern's Tennessee Electric Power Company. The TVA is acting in association with Chattanooga, Nashville, and other municipalities in making this purchase.

The measure also earmarked $6,500,000 for the proposed purchase of other Commonwealth & Southern properties in 27 counties in north Alabama and Mississippi. In addition, $7,000,000 was earmarked for rehabilitating the properties and connecting them with TVA's transmission lines, and $2,000,000 for loans to small municipalities participating in the deals.

Republicans protested the surrender of several House amendments, including one confining TVA power sales to the Tennessee watershed. Chairman May, of Kentucky, foe of the TVA, offered the conference report to the House with the statement that while it was not so restrictive as he wanted, it "will force the TVA to return to Congress for approval in advance of any further expansion." He said earmarking of the bonds would limit expansion effectively. He denied one Republican charge that the bill was written by Wendell L. Willkie, president of Commonwealth & Southern, and L. J. Wilhoite, chairman of the Chattanooga Public Power Board, and said he had prepared the measure himself.

Bill to Bar FCC Censoring

REPRESENTATIVE John J. Cochran, Democrat of St. Louis, introduced in the House on July 13th a bill to deprive the Federal Communications Commission of its assumed authority to limit radio broadcasts over international short-wave stations to programs that will "promote international good will, understanding, and coöperation."

In May, the FCC, without public hearings, issued regulations covering international broadcasts, implying that if the programs violated the "good will" rule the stations would lose their licenses. The National Association of Broadcasters and the American Civil Liberties Union immediately challenged the power of the commission to promulgate such orders, declaring that they were in conflict with the constitutional guaranties of free speech and the 1934 Communications Act. The commission granted a hearing, with a view to reconsidering the regulations.

Cochran's bill would provide that after the enactment of his proposal the commission could not impose any penalty or withdraw any privilege from a broadcaster who violates the May order, and further declared that no rule or regulation issued hereafter "shall have the effect of limiting broadcasts to service which will reflect the culture of the United States or promote international good will, understanding, and coöperation."

In introducing the bill Cochran said it would be a good idea for the international broadcasters to exercise care in their programs, but he added:

"It looks to me as if the commission is setting a dangerous precedent, and if it is permitted to make such rules and regulations, it might in the future deny others the right of free expression."

Boulder Rate Cut Urged

FAVORABLE consideration of a bill to adjust power and interest rates at Boulder dam and thereby bring the huge power project into line with similar Federal undertakings was urged recently by Representative Scrugham, Democrat of Nevada, as hearings on the subject began before the House Irrigation and Reclamation Committee.

Until the long-delayed rate revision is enacted, "controversy and dissension" among the seven subscriber states of the Colorado basin will continue indefinitely, Scrugham told the committee. He pointed out that suggested improvements to the Boulder Canyon Project Act would protect the interests of the contract holders and, at the same time, assure the

United States of a return on its $165,000,000 investment.

Judge Clifford H. Stone, director of the Colorado Water Conservation Board and chairman of a special committee which studied the rate structure of the dam last summer, assured the committee that the new agreement had not been arrived at "on a horse-trading basis." Careful study was given the legislation which would reduce power rates, cut interest charges to the Federal government from 4 to 3 per cent, and defer payment on a $25,000,000 flood-control item until after 1987—the end of the amortization period of the great dam.

Annual payment of $300,000 each to Nevada and Arizona, in lieu of 18¾ per cent of the dam's revenues, and earmarking of a separate fund of $500,000 a year for development of the Colorado basin assured the states of a more comprehensive improvement program than under the original legislation, Stone said.

Asserting that the government stood to "make millions" if the fiscal operation of the project remained undisturbed, S. B. Robinson, chief assistant city attorney of Los Angeles, told the committee "the record will show this was never intended to be a revenue-making project."

Robinson advocated approval of legislation which would revise the fiscal set-up of the big Colorado river development in line with recommendations of the committee representing the seven basin states. Robinson told the committee he was satisfied that the Boulder project was "as financially sound as anything in the United States can possibly be."

He added that if the present rates charged by the government for falling water to power contractors were to be continued, the project's cost would be amortized "in far short of fifty years," the period contemplated in the project act of 1928.

Alabama

Told to Recapture Tax Loss

CLAIMING that TVA is adequately compensating Alabama for ad valorem tax losses occasioned by operations in the state, William C. Fitts, Jr., solicitor for the Federal authority, declared recently that the problem facing the state legislature was whether it would recapture from municipalities what was being paid on electric power distribution properties.

Fitts made this assertion as he and Dr. T. L. Howard, TVA economist, went before the legislative recess finance and taxation committee on July 13th as the group sought ways and means of recovering tax losses.

Senator Oliver Young, of Vernon, member of a subcommittee that went to Knoxville last May for a study of the problem, presided over the hearing which he said likely would result in recommendations to the legislature for recovering ad valorem tax losses estimated by him to range from $170,000 to $190,000 annually in the state.

When told the amount of Senator Young's estimate, Fitts said:

"We are not apart on figures. TVA this year will pay the state of Alabama about $185,000 for ad valorem tax losses—about the same as Senator Young's estimate. That leaves a question of whether the state is going to recapture from municipalities what was paid on power distribution properties in ad valorem taxes."

Fitts pointed out, as has been previously emphasized, that the cities in the state with municipal distribution systems supplying the consumer TVA power already are collecting the equivalent of ad valorem taxes in the rate set up by TVA to be charged.

Appearing before the same committee on July 14th, Thomas W. Martin, president of the Alabama Power Company, made a plea for legislation giving investors in private industry "reasonable protection." Martin not only told the committee that demand for power in Alabama would result in a $100,000,000 expansion program by 1950, provided such legislation was enacted, but that his company in the next two years would be enabled to spend $10,000,000 for development and employment of 2,000 to 3,000 additional persons.

Martin pointed to the heavy taxes borne by his company and other private electric companies, but emphasized he was not seeking removal of such taxes, but only protection that would come from a law requiring municipalities entering the power field either to purchase or condemn existing facilities.

California

Committee Favors Franchise

THE San Francisco board of supervisors' joint finance and utilities committee last month voted to grant the Pacific Gas & Electric Company an indeterminate franchise covering use of city streets for conduits and other distribution facilities.

Under terms to which the committee agreed, the company had made a lump sum payment of

$500,000 and thereafter will pay about $160,000 annually. Officials recognize that the company would collect the tax from ratepayers, it was said.

The annual payment for the franchise would be on the basis of one-half of one per cent of gross receipts from sales of electricity in San Francisco, and one per cent of gas revenues. Each would amount to about $80,000 a year, according to city rate experts.

The annual payments for which the committee voted were the same as those proposed recently by company representatives.

Receive Damage Claims

BRINGING to a close the bitter 5-year transmission line battle at South Gate, property owners of this city and Huntington Park will receive an estimated $200,000 in damage claims from the Los Angeles department of water and power, it was learned recently.

Approximately 1,100 property owners will receive payments ranging from 10 to 35 per cent of the 1935 assessed valuations, according to G. Ellsworth Meyer, deputy city attorney in charge of investigations.

Property owners must file a certificate of title satisfactory to the Los Angeles city attorney and "execute a full and complete release in favor of the city for any damages resulting from construction or operation of the lines," Meyer pointed out. Persons who own property 300 feet on either side of the transmission lines were eligible to file for damages.

Colorado

Votes Fight Fund

AN appropriation of $2,000 was given Mayor Benjamin F. Stapleton by the Denver city council last month to finance a fight to the finish for Denver gas rate reductions. At the same time the mayor served notice no quarter would be given by the city in the battle it had opened to force the Colorado Interstate Gas Company to reduce the 40-cent gate rate which the Public Service Company of Colorado was said to blame for its purported inability to reduce Denver domestic gas rates.

The mayor told the council that he sat at the conference table with Colorado Interstate Company officials twice, but was unable to get any rate concession.

The mayor asked the council, and it agreed, to transfer $2,000 from the general fund to his contingent fund to finance preparation of the city's fight. Part of the money would be used to employ two engineers to work with the Federal Power Commission experts on their valuation of the pipe line through which natural gas is transported to Denver from Texas. The rest would be used in connection with the part of the rate investigation that City Accountant Charles Wilson was handling. Wilson is working in coöperation with the Federal Power Commission. He said his studies and those of the FPC would not be completed for a hearing before next winter.

If the Denver attack upon the gate rate is successful, it was expected numerous other cities would demand similar gas rate reductions.

Illinois

Loses Tax Claim Appeal

A RULING by the Federal Board of Tax Appeals assessing a deficiency income tax of $1,076,314.40 against the United Light & Power Company was sustained recently by the U. S. Circuit Court of Appeals.

The assessment against the public utility holding company involved income for the year 1928.

Michigan

FCC Rules License Needed

THE Federal Power Commission recently ruled that the Copper District Power Company must procure a license for the proposed construction of a project at Bond Falls on the middle branch of the Ontonagon river in Michigan.

The proposed project would consist of a diversion dam 45 feet high which would create a storage reservoir having a surface area of 2,160 acres, and usable storage capacity of 45,000 acre-feet, controlling works, several short concrete pipes, and 7,500 feet of open canal.

The commission ruled that since the Ontonogan river discharges into Lake Superior and is navigable for at least something over five miles

above its mouth, operation of the project would result in storage in the reservoir of high flows which would otherwise contribute to destructive run-offs.

Minnesota

Phone Rate Protests Scored

ATTEMPTS by state officials and the Tri-State Telephone & Telegraph Company to block the injunction suit which would throw out a "compromise" telephone rate order of last May were overruled on July 13th by Judge Gustavus Loevinger of Ramsey county district court.

Efforts to block the injunction were in the form of demurrers by the state railroad and warehouse commission, Attorney General J. A. A. Burnquist, and the telephone company. The "compromise" order established rate cuts averaging 12 per cent for subscribers in the St. Paul metropolitan area and in Minneapolis.

If the commission, Burnquist, and the company are restrained from putting the May "compromise" order into effect, additional reductions totaling $300,000 for the St. Paul area will be reinstated under a 1936 order already upheld by the Minnesota Supreme Court.

In a 23-page memorandum made a part of his order, Judge Loevinger indicated strongly that the court would grant the injunction unless the defendants were able to produce new facts to justify the commission's failure to hold any public hearings prior to its May order, and its failure to make any findings of fact in that order, as required by law.

Governor Stassen subsequently asked for the order and Judge Loevinger's lengthy memorandum attached to it for study in connection with a petition for removal of members of the state railroad and warehouse commission, which had been on his desk for some time.

The petition sought removal of the three commissioners, Charles Munn, Hjalmar Petersen, and Frank W. Matson, on grounds their May telephone rate order was a violation of law.

Mississippi

Natural Gas Field Restricted

THE city commission, moving to conserve gas from Jackson's natural gas field "for the use and benefit of the people of Jackson and the inhabitants of Mississippi," last month passed an ordinance imposing strict regulations on future drilling.

The ordinance, stating that the supply of gas "is being depleted by heavy pulling and by permitting the wells to run at maximum pressure," ordered that wells drilled hereafter shall not be permitted to flow at greater than 100 pounds line pressure.

Wells were flowing at approximately 300 pounds pressure, which permitted distribution of the supply to points as far away as Pensacola, Fla.

Missouri

Rural Electrification Bill Signed

GOVERNOR Lloyd C. Stark last month signed the bill legalizing the operation of 27 rural electrification coöperatives serving more than 28,000 Missourians. Opponents of the measure objected to "Washington pressure" for it, but it got through the sixtieth general assembly.

An amendment to which Federal officials have objected places the coöperatives under the supervision of the state public service commission for safety regulation. The state commission is barred specifically from the right to regulate service, rates, or financing of the coöperatives.

John M. Carmody, former REA Administrator, in a telegram had protested against amendments that "would saddle farmers' coöperatives with burdensome and restrictive legislation."

Under the act, groups of persons in rural communities may form coöperative associations to build transmission lines with funds obtained from the Federal Rural Electrification Administration to serve members of such associations.

Gas Hearing Opened

THE state public service commission on July 6th began hearing the reopened rate and valuation case of the Laclede Gas Light Company of St. Louis, pending at intervals for twelve years, for the purpose of hearing the company's proposed "promotional" rate schedule.

The new schedule, with an estimated saving

of 7 per cent to domestic customers, would not affect industrial rates, but would provide changes in the general service and residential heating rates, and establish the new classification of refrigeration, air conditioning, and commercial space-heating service. The new rates could not become effective without approval by the commission.

A petition, signed by 17,000 St. Louis gas consumers, was presented protesting against a minimum service charge of 75 cents for service call, to repair or adjust gas apparatus, which the company wished to install in connection with the new rates.

A petition for the right to intervene in the rate case, filed previously by the Gas House Workers, St. Louis Local 12,006, was granted by the commission.

Harold C. Hanke, associate city counselor of St. Louis, presented the city's objection to the reopening of the rate case and its consolidation with the more recent request for the approval of the "promotional" rates.

Hanke charged that the company's only purpose in reopening the old rate case was to make its claim for the $1,400,000 impounded gas rate fund, to which the company had asserted its claim. The fund represented the difference between the amounts collected by the company under the old rates and the amounts it would have collected if the 6 per cent reduction in rates ordered by the commission in 1934 had gone into effect.

The Laclede Company on July 8th offered to settle the case by returning to its consumers $1,066,000 in the impounded gas rate fund and retaining for the company about $358,000 of the fund. The proposal was made by Guy A. Thompson, company attorney, who announced the company was willing to agree to the disposition of the impounded fund on the basis that the amounts impounded prior to the enactment of the 5 per cent gross receipts tax by the city in May, 1938, be returned to the consumers, and the amount subsequently impounded be retained by the company.

The city, in a formal statement filed with the state public service commission on July 18th, rejected the compromise offer of the utility, and again insisted that the entire fund be returned to consumers.

The city recommended that the order reopening the litigation and consolidating the new rate schedule with that case be set aside and that evidence offered at the recent hearing be used only for determining the issues in connection with the proposed rates. The city contended the state commission had reversed itself by permitting the company to introduce at the hearing testimony and exhibits concerning the company's experience since the 1934 rate order.

Nebraska

State Power Committee

PAUL Marvin of Beatrice was recently named chairman of a committee of rural electrification district officials to coöperate with Nebraska's hydroelectric projects in development of a statewide public power program. Creation of the committee, at Marvin's suggestion, came during a conference of hydro and REA officials at Columbus last month.

Chester Graff of Bancroft, president of the REA organization, appointed Petrus Nelson of Stromsburg, H. C. Slonecker of York, E. D. Beck of Tekamah, W. F. Heerman of Pilger, F. A. Marts of Syracuse, P. P. Cedar of Genoa, Frank Malone of Madison, and A. G. Wydow of Wayne as committee members.

Rural electrification project officials voted to meet again at Columbus in October for their annual convention.

Ohio

Rate Cut Unsatisfactory

INVESTIGATION of the rates of the larger Ohio cities to determine if the proposed light rate announced by the Columbus & Southern Ohio Electric Company "compares favorably" with the rates paid by residential consumers elsewhere in the state, was started by the Columbus city council last month.

Council President Wyatt L. Millikin revealed that reports and data showing what other cities have to pay for electric power were in the hands of the council and would be studied thoroughly. Several councilmen professed surprise that the proposed new rate suggested by Ben W. Marr, president of the utility, was "still out of line" with similar rates in other cities.

While the offer submitted included a reduction in the residential rates varying from 8 to 15 per cent, a study of comparative rate schedules of several large Ohio cities was said to have revealed that the utility's offer was still from 10 to 40 per cent higher than these rates. It was expected the council would call on the Columbus & Ohio Electric Company to revise its original offer. The new rate schedule proposed by the utility would amount to an annual saving ranging from $250,000 to $300,000.

Oklahoma

FPC Grants Amended License

THE Federal Power Commission last month granted an amended license to the Grand River Dam Authority authorizing construction of the Grand river dam project with water storage to 745 feet above sea level—permitting construction of the project without changing present plans.

The Army Engineers had recommended that the water storage requirement be fixed at a 755-foot level because of flood control considerations. But they subsequently acceded to requests of the Public Works Administration, the Federal Power Commission, and the Grand River Authority to reduce the requirement until such time as the government could furnish flood control funds.

Oregon

Oppose Utility District

VOTERS of Linn county, at a special election last month, turned down a proposal to form the Linn County Public Utility District, according to Z. E. Merrill, president of the Mountain States Power Company.

The area contained in the proposed district included seven municipalities, six of which voted decisively against the project. The proposal would organize a publicly owned power project to take over the distribution in urban and rural sections of Linn county now served by the private company.

Business men of Linn county's municipalities had been urged to support the proposal, and farmers who were said to be "fighting the battles of the Mountain States Power Company" by opposing it were scored in a resolution passed by the Linn county Pomono grange at its bi-monthly meeting in Brownsville last month.

The resolution asserted that the grange has "for the last seventy years endeavored to improve the living conditions on the farm," and therefore should not be opposed by farmers in its endeavor to bring to a larger number of rural residents "the conveniences of the home, the same as those enjoyed by the city homes."

The resolution furthermore accused the Mountain States Power Company of distributing "propaganda which is very misleading and confusing to the minds of the voters of the district."

Hood River PUD Target

THE Hood River Farm Bureau Federation recently asked the state hydroelectric commission to reject as impractical the formation of a utility district in rural Hood River county.

Satisfactory operation was regarded as impossible without participation of the city of Hood River. The city rejected but the rural area accepted the proposal at a special election.

The county Pomona grange went on record recently favoring immediate application for commission authorization.

Pennsylvania

Commission Appointee

RALPH W. Thorne, of Williamsport, Republican county chairman of Lycoming and one of the original James-for-governor men, was named last month by Governor James as a member of the state public utility commission, effective July 12th.

He succeeded Donald M. Livingston, who resigned shortly before his term expired last April 1st.

The commission now has its full quota of five members for the first time since Livingston and John Sullivan left it early in the spring. P. S. Stahlnecker, recently named by the governor as a member of the Unemployment Compensation Board of Review, had frequently been mentioned for the place.

The new commissioner is an engineer and manufacturer.

Fight Power Project

A GROUP of twelve eastern railroads last month led the fight against the proposed $75,000,000 hydroelectric power project dams on the upper Delaware river. C. T. Wolfe, assistant general attorney of the Reading Company, and spokesman for the railroads, told Army Engineers at a public hearing in Philadelphia that the project would eliminate use of 500,000 to 1,000,000 tons of anthracite annually for power production.

Major C. W. Burlin, district engineer, presided at the hearing, where large delegations of business, labor, and civic leaders from the anthracite region assembled to oppose the "little TVA." They maintained the power program would ruin the coal mining industry and cause a serious economic condition.

Wolfe told the engineers that construction

of the hydroelectric power project would jeopardize the railroad industry in the eastern United States through the loss of revenue obtained from transporting coal.

Letters and telegrams from throughout the coal region were read, all opposing the project.

General Secretary George W. Elliott of the Philadelphia Chamber of Commerce said that the organization did not "believe the project economically justified."

RFC Approves Loan

THE Reconstruction Finance Corporation on July 12th formally agreed to solve Philadelphia's financial troubles by putting up half the $41,000,000 to be raised on future gas works rentals. The remaining half has already been subscribed by 26 banks and other institutions in Pennsylvania and New Jersey. As security, the city will assign approximately thirteen years of rentals paid by the Philadelphia Gas Works Company at the rate of $4,200,000 a year for the right to operate the municipal gas plant.

The date of disbursement was set for July 21st. Chauncey Smith, assistant secretary of the Security Banknote Company, representing the subscribers, to whom the rentals will be assigned, will assign them in turn to the Fidelity-Philadelphia Trust Company as trustee. That company will then issue trust certificates to the various subscribers for the amounts of their pledges.

Texas

Brazos Gets Army OK

ARMY Engineers last month recommended to Congress expenditure of $8,350,000 for construction of Whitney dam, 38 miles above Waco, on the Brazos river.

A report by Major General Julian L. Schley, chief of engineers, said the dam could be used for flood control and power development. Construction of a power plant capable of generating 60,191,000 kilowatt hours annually would add $1,800,000 to the initial cost, he said.

General Schley said the power could be sold for $233,000 annually. Annual maintenance cost of the flood control project was estimated at $30,000, with an additional $40,000 for maintenance of the power project.

The dam would have a gross storage capacity of 721,000 acre-feet, of which 491,000 acre-feet would be used for flood control and the rest for power and control of river stage, it was reported.

Utah

Plan Utility Referendum

APPLICATIONS of the citizens committee of Provo for petition copies for a referendum election on an ordinance and two resolutions passed by the city commission on June 29th were rejected recently by City Recorder I. Grant Bench upon the advice of City Attorney I. E. Brockbank.

The fourth application of the citizens' committee for petition copies for a referendum election on an ordinance also passed by the city commission at the same meeting was granted by City Recorder Bench, and printers' bids for the copies called for.

The ordinance and two resolutions on which Recorder Bench refused the citizens' committee applications were: The ordinance that made the municipal power bonds of $850,000 callable and changed the maturity date and the schedule of repayments, and the resolutions accepting the new John Nuveen Company proposal for the sale of the bonds and naming the First National Bank of Chicago as depository for the bonds.

The ordinance on which the recorder accepted the application and called for printers' bids was that which stated that the city commission would not grant or renew any franchise to sell electric power to any competing company within the limits of Provo, when the city acquires its own electric plant and system.

The three applications on the bond ordinance and two resolutions were denied on the grounds that they are administrative and therefore not referable, Mr. Bench said.

Virginia

Decide Against Reduction

THE Danville council finance committee recently decided against a reduction of electric rates, at least for the rest of the year.

The negative vote on the matter was taken on the grounds that rate structures cannot wisely be tampered with in the middle of a

fiscal year when no provision has been made in the city budget to provide for the lowered income which a rate cut would entail.

Another factor was the fact that additional claims by the contractor on the Pinnacles project were pending and a suit had been filed by an engineering company relative to use of plans.

Washington

To Meet Rate Slash

THE Puget Sound Power & Light Company's announcement on July 11th of a rate reduction, expected to bring a $700,000 tariff saving annually, was met in Seattle by announcement that City Light would meet the slash.

The state department of public service announced the private company's new rate schedule, effective September 1st, would mean savings to Seattle residential and commercial ratepayers of approximately $184,000 annually.

Informed of the company's announcement, City Council President James Scavotto said that since March city officials had been planning a survey with the hope of making a cut.

Scavotto scouted any suggestion that a sweeping City Light rate reduction might impair strength of bond issues floated by the municipally owned power company.

The private power company's new rate schedule, filed without previous notice, was as follows for the Seattle metropolitan area:

First block of 40 kilowatt hours a month cut from 5 cents to 4½ cents a kilowatt hour for residences, commercial lighting service, and schools, halls, and churches.

The first block of 40 kilowatt hours for residential service in rural territory was reduced from 5 to 4½ cents; second 100 kilowatt hours, from 3 to 2½ cents a kilowatt hour; additional blocks unchanged; minimum of one cent for all over 240 kilowatt hours.

Court Halts Vote

THE Washington Water Power Company last month obtained a temporary injunction in the state superior court to prevent the Spokane city council from holding a special election over a franchise granted a subsidiary this spring.

The utility company and eleven Spokane men joined in the petition before Superior Judge Fred H. Witt, contending the city was without authority to call the election, which would be illegal. The judge granted the injunction pending a full hearing.

Wisconsin

"Little TVA" Proposed

CREATION of a "little TVA" through establishment of a reservoir to maintain water levels and feed power plants on the Wolf and lower Fox rivers was proposed in the state senate last month.

Senator Michael F. Kresky, Progressive of Green Bay, offered an amendment to a bill to charter the Wolf River Reservoir Company, private corporation planning a reservoir near Lily in Langlade county. Kresky's amendment would authorize the development by a quasi public corporation empowered to produce, distribute, and sell electric power.

The bill originally contemplated construction of the reservoir for producing a more uniform flow of these rivers, improving their navigation, and eliminating flood dangers.

Kresky contended the development should be public rather than private to insure against exploitation by power interests. Introduction of his substitute plan automatically laid the bill over.

Wyoming

Electric Rates Cut

THE Mountain States Power Company last month filed with the state public service commission a new schedule of residential electric rates.

John Hancock, secretary of the state commission, said the new rates represented a reduction of approximately 20 per cent and would affect consumers in Casper, Douglas, Glenrock, Parkerton, Glendo, Cassa, and Orin Junction.

Hancock said that power consumers in the communities served by the company had been given an annual saving of $92,800 as a result of reductions made by the concern in residential, commercial, and industrial schedules.

The Latest Utility Rulings

SEC Commissioners Discuss Reproduction Cost And Write-up in Securities Case

A SUBSIDIARY company of a registered holding company was held by the Securities and Exchange Commission to be entitled to an order exempting proposed security issues from the provisions of § 6(a) of the Public Utility Holding Company Act pursuant to § 6(b) of that act, where it was shown that the state commission had expressly authorized the security issues and the issues were for the purpose of financing the business of the applicant. This ruling was made in view of the statutory requirement of authorization under such circumstances, but three of the commissioners took occasion to criticize book values written up to reflect excess acquisition cost of a holding company and reproduction cost as a factor in security issuance.

Commissioner Healy, after discussing the steps by which book values had been written up, said:

> . . . the property account of the applicant is based upon the price which a holding company was willing to pay to obtain control of the voting stock of the applicant and its predecessors, and I have pointed out how the metamorphosis was accomplished. On these facts I challenge the propriety and wisdom of property accounts being made up in the fashion described, and I especially challenge the propriety of such figures being used to balance security issues put out to the public by operating companies. I cannot see why holding company costs should be reflected in the operating company's balance sheet, especially since these costs so often include excesses which the state (and the Federal government before the passage of the Public Utility Holding Company Act) was powerless to prevent.

He referred to the fact that the authorization of the state commission for security issues to be refunded, which authorization had been granted in 1931, dealt with these matters and that such authorization was based, at least in part, upon a reproduction cost appraisal. He then discussed the history of the reproduction cost theory and concluded with these words:

> The view that Smyth *v.* Ames in some way justifies the recording of reproduction estimates on books of account and the issuance of securities of an equivalent amount is based upon a distortion and misapplication of that famous decision and has done incalculable injury both to the public and to the utility industry.

Commissioner Eicher recorded his agreement with the observation on reproduction cost as set forth by Commissioner Healy. He said that the public interest is flagrantly prostituted when a corporate structure that is built on a natural or statutory monopoly becomes the legal instrument for capitalizing property at valuations in excess of cost. He declared his opposition to permitting a periodic reappraisal to bulwark additional securities issues beyond the fair values gauged by the prudent investment upon which privately owned property devoted to public use enjoys constitutional protection against confiscation.

Commissioner Frank, in a separate opinion, stressed sale or exchange value as the proper criterion when securities are issued. The controlling factor when considering issuance of new securities, he said, is the reasonable expectation of the future earnings of the issuing company, and future earnings have been considered by the courts in determining sale or exchange value.

He discussed the future possibilities which a careful investor would consider, such as possible future reductions in the rate base, which would affect earnings, and a possible change in the Supreme Court rule as to reproduction cost as a factor in determining the rate base. Such

contingencies would be taken into account, especially when dealing with debt securities, for they carry with them the possibility of future defaults and resultant necessity for reorganization if earnings substantially decline. *Re Central Illinois Electric & Gas Co. (File No. 32-146, Release No. 1592).*

Private Producer Selling Gas to Public Utility Not Subject to Commission Jurisdiction

THE supreme court of Texas reversed a judgment of the court of civil appeals and affirmed a judgment of the district court enjoining the enforcement of an order of the commission attempting to fix the price a privately owned gas company was to charge for gas produced on its own land and sold to a public utility, saying that the state railroad commission had no jurisdiction to do so.

The court stated that a corporation which produces gas on its own premises does not become a public utility subject to the jurisdiction of the commission by contracting to sell such gas to a public utility, although the contract requires the utility to deposit a large forfeit to insure its carrying out the contract, to purchase a daily minimum quantity of gas, to construct pipe lines to serve certain cities and towns, and to try to develop a gas market.

It was held that the commission does not have jurisdiction over mere producers of gas who sell their product at the point of origin. The court stated:

> It seems to be argued that our gas utility statutes, by necessary implication, confer the power on the commission to fix the price of gas where it is sold by the producer on the premises of production to a public gas utility. We think that the power to fix prices and make rates by a board or commission is not to be taken as conferred by implication. Such power must be conferred under statutory or constitutional language that is free from doubt, and that admits of no other reasonable construction.

In conclusion it was held that in fixing gas rates the commission has the power and duty to inquire into the reasonableness or unreasonableness of the gas utility's contracts to purchase gas. *Humble Oil & Refining Co. et al. v. Railroad Commission of Texas et al. 128 S. W. (2d) 9.*

Power Commission Asserts Jurisdiction and Authorizes Split-up of No-par Stock

IN what was termed a "precedent setting decision" the Federal Power Commission authorized a corporation subject to its jurisdiction to split its no-par value common stock four for one and to fix a par value for the split stock. The applicant asked for authority to effectuate this transaction or for an order dismissing the application for want of jurisdiction. The commission held that the proposed transaction would constitute the issue of securities within the purview of § 204(a) of the Federal Power Act.

The applicant transmits and distributes electric energy to the public in the states of Minnesota, North Dakota, and South Dakota; and the states of Minnesota and South Dakota do not have state commissions under which security issues are regulated.

It had been proposed that the new stock should be issued at a par value of $1 per share for and in conversion of outstanding shares. The commission, however, disapproved such par value, stating:

> There is no inflation in the asset accounts of the applicant and the common stock of the applicant has been issued over the life of the company at prices representing an

average paid-in amount approximating $103 per share; the indicated book value of the applicant's common stock is approximately $142 per share, or $39 per share in excess of the paid-in amount; the January, 1939, market value of such stock was about $75 per share; therefore, the fixing of a par value of $1 per share for the proposed stock (equal to $4 per share for the outstanding stock) is not reasonable, a reasonable and convenient par value of such stock being $25 per share.

Provision for equal voting rights for all shares of the company's common stock, whether founders' common stock or special common stock, the commission held, would be in the public interest and would promote the accomplishment of the stated purpose, which was to obtain a wider market and better distribution of common stock through the reduction in the unit of such stock which might be purchased by investors.

Commissioner Scott concurred in that part of the commission's order which held that the proposed transaction constituted an issue of securities. He was unable to agree, however, that the company had met the statutory requirements which must be discharged by it before the commission might grant the authorization sought. He was of the opinion that § 204(a) provides more detailed standards than § 203(a) of the act, which pertains to the transfer of facilities subject to the jurisdiction of the commission.

He expressed the view that affirmative proof must be furnished that the purpose of the issue is not only lawful and within charter powers but is also compatible with the public interest. He did not think that this had been proven. Moreover, he said, there was nothing to show that any benefit that might be derived by the corporation as the result of the proposed stock split-up would be passed on to the consumers. *Re Otter Tail Power Co. (Docket No. IT-5533).*

Temporary Rate Statute with Provision for Recoupment Is Upheld

In the case of Driscoll *v.* Edison Power & Light Co. (U. S. Sup. Ct. 1939) 28 P.U.R.(N.S.) 65, 59 S. Ct. 715, the court did not pass upon the temporary rate feature of the Pennsylvania Public Utility Act, involving a provision for recoupment of losses sustained under temporary rates, because in that case the commission had actually considered all elements necessary for establishing a rate base. The question was left open whether a temporary rate is constitutional if, although based solely on depreciated original cost, there is statutory provision for recoupment by the utility company. This issue has now been decided by a Federal court in favor of the validity of the statute.

The Pennsylvania commission had calculated a temporary rate base by deducting accrued depreciation from the total of the estimated original cost of the property used and useful and, after adding working capital and materials and supplies, allowed a 6 per cent return. Reference was made to the decision of the New York court of appeals in Bronx Gas & E. Co. *v.* Maltbie (1936), 271 N.Y. 364, 14 P.U.R.(N.S.) 337, 3 N.E.(2d) 512, where the constitutionality of a similar temporary rate provision of the New York law was upheld. The Federal court approved the reasoning of the New York opinion, stating:

> The order of the commission fixing temporary rates in the case before us was not a final legislative act such as could operate to confiscate the water company's property in any permanent sense. Not only was it limited in time but it was temporary in its effect. This is so because of paragraph (e) of § 310 which requires the commission upon final determination of the rates to permit the water company to recoup its loss, through a temporary increase, if the final rates prove to be higher than the temporary rates. In this respect the case is clearly distinguishable from Prendergast *v.* New York Teleph. Co. 262 U. S. 43, P. U. R. 1923C, 719, which involved a temporary rate that was not subject to adjustment or recoupment.

On the same premise the court overruled a contention that the order was made in violation of the procedural protection afforded by the due process clause of the Constitution, stating:

> As we have shown, the temporary rates prescribed by the commission do not affect finally or permanently the rights of the water company in such fashion as to deprive that company of its property. We, of course, do not hold that temporary rates may be fixed by the commission capriciously or arbitrarily and without regard to the minimum standard laid down in the statute. The record in this case, however, discloses that the commission fixed the temporary rates upon the basis of original cost, less accrued depreciation, as the statute required, and allowed a return of 1 per cent more than the statutory minimum. It determined this basis upon the final result of a prior rate proceeding of the water company and upon evidence offered at the hearings by the water company, which, in our opinion, provided ample support for the commission's findings. In fixing a rate which is truly temporary in its effect we think that the commission need have before it merely sufficient evidence to furnish prima facie support for its findings.

The court accordingly dissolved an interlocutory injunction and dismissed a bill of complaint filed by the utility company. *Beaver Valley Water Co. v. Driscoll et al.*

Extraterritorial Water Service Authorized

THE Pennsylvania Public Utility Commission authorized a city to construct a water main to a locality outside the corporate limits and to serve water to such territory, on the ground that such service is both necessary and proper, and clearly in the interest of the public welfare and safety.

The commission held that its only duty, in determining whether it should authorize a municipality to extend its water system beyond the corporate limits, is to consider whether the specific plan submitted is necessary or proper for the accommodation and safety of the public.

Protestants alleged that the proposed supply of water could be provided at less expense to the city than the proposed construction would entail. The commission stated:

> Mr. Nagle makes an extended argument to the effect that, in place of the proposed extension, the city should construct a small filtration plant at Water Works park, at a cost of probably $30,000; that, in any case, a 6-inch main should be used instead of 8-inch pipe; that it is not necessary to make available a supply of water exceeding 15,000 to 20,000 gallons daily at Water Works park. We think these are matters largely within the discretion of the officials of the city of Erie, in charge of its water system.

Re City of Erie (Application Docket No. 57694).

Prior Operations of Air Carrier Held Insufficient To Justify Grant of Certificate

AN application by an air carrier for a certificate of public convenience and necessity under § 401(e)(1) of the Civil Aeronautics Act of 1938 was denied by the Civil Aeronautics Authority on the ground that, although a substantial demand for service had existed during the "grandfather" period, the applicant had rendered such slight service as to amount almost to no service at all in the light of the traffic demand. Financial inability was advanced as one of the reasons for operating only a meager service, but the commission said that it was not concerned with the underlying causes giving rise to inadequate and inefficient service.

Another air carrier had been denied leave to intervene in the proceeding, but it entered an appearance and introduced

evidence. The commission held that this evidence was relevant and material to the issue of whether the applicant's service was inadequate and inefficient during the "grandfather" period.

The applicant produced evidence to show that the mechanical equipment and the personnel met the safety requirements and rules of the then existing Bureau of Air Commerce of the Department of Commerce, and an air carrier inspector qualified as an expert witness stated that by those standards, in his opinion, the operations as conducted by the applicant during the "grandfather" period were adequate and efficient. The authority, however, said that, in determining whether service rendered by a particular air carrier was adequate and efficient within the meaning of the law, it was not limited to the consideration of technical quality alone. *Re Airline Feeder System, Inc. (Docket No. 57-401-E-1, Serial No. 65).*

Construction of Power Line Approved

THE state corporation commission of Kansas approved the plans, specifications, and location of a proposed electric power transmission line and in doing so set out numerous principles of law.

It was stated that all telephone lines should be placed on one side of the highway and all electric transmission lines on the other side, where both circuits are on the same highway, so that as far as practicable one side of the highway will be available as the communication side and one side as the supply side.

The commission held further that unnecessary crossing of electric transmission lines from one side of the highway to the other should be avoided.

Electric and telephone companies should not overbuild or underbuild one line by another, it was said, except upon the written permission from the wire using company involved, or unless expressly authorized by the commission.

The commission also held that it is authorized by statute to prescribe reasonable rules and regulations with respect to stringing and maintaining wires on the highways where there is danger or possibility of unreasonable interference to the wires or service of one utility by those of another utility, but it cannot assess damages in favor of one utility as against the other.

Concerning the duty of public utilities with respect to the stringing of lines the commission said:

> Electric transmission companies and telephone companies have the right to the use of the public highways in this state, but neither has the right to use such highways to the exclusion of the other. It is therefore the duty of any utility company using the highways for transmission purposes to construct its lines according to the best known methods to prevent interference.

Re Coffey County Rural Electric Coöperative Asso. Inc. (Docket No. 19037, TL-274).

Substitution of Natural Gas for Artificial Gas Meets Commission Approval

THE Tennessee commission approved the discontinuance of manufactured gas service and the substitution of natural gas service in order to enable the public to use the natural product for its heating requirements at a lower cost. Proposed rate schedules for the natural gas were also approved on the basis of reports and records before the commission, indicating that earnings of the gas department under the schedule would not be more than reasonable, and therefore that the rates should be allowed to become effective. The commission said

that in allowing these rates it did so reserving its rights, privileges, and duty of changing the schedules at any time in the future whenever the earnings of the company are such as to justify reduction.

Commissioner Jourolmon concurred in the opinion of the majority in approving the change but criticized the allowance of new gas rates without an investigation to determine whether the change would result in the greatest possible reductions and savings to gas customers. He said that the commission had not required the company by formal hearing to show that the natural gas rates were reasonable but had accepted the mere statement that there would be substantial savings to consumers.

The commission did not approve or disapprove a contract entered into with a pipe-line company operating in another state as it was not in position to pass upon all the terms and conditions set out. The commission did, however, reserve its rights and duties of permitting the utility company to charge to operating expenses only just and reasonable amounts for the purchase of gas. Commissioner Jourolmon agreed that the commission should withhold its approval of the contract, but expressed the view that the commission should investigate the relationship between the companies. Although the application asserted that there was no affiliation between the companies, a press dispatch, said the commissioner, indicated that the same person was in managerial control of both companies. *Re East Tennessee Light & Power Co. (Docket No. 2259).*

Following its approval the commission received a petition from certain customers against the rates, and thereupon ordered an investigation to determine whether the rates for distribution of natural gas should not be changed and reduced. *Re East Tennessee Light & Power Co. (Docket No. 2300).*

Other Important Rulings

THE Colorado commission stated that it could not issue private carrier permits if this would tend to impair the service of common carriers rendering a like service. *Re Sanchez (Application No. 4918-PP, Decision No. 13334).*

The public service commission of Missouri has held that an electric utility applying for authority to construct a 3-phase 4-wire transmission and distribution system, in lieu of a 3-phase 3-wire system, should be required to exercise greater care in the operation of the proposed system, in an effort to mitigate interference with other circuits, than is required in the operation of 3-phase 3-wire systems. *Re United Utilities Corp. (Case No. 9705).*

The Arkansas Supreme Court held that one who is operating a vehicle regularly over a designated route and who incidentally accepts passengers for compensation without a license to do so is using the highways for a purpose within the purview of the statute regulating motor vehicles used in the transportation of persons or property for hire and is subject to fine, although his primary purpose is that of carrying the mail. *Kelley v. State, 128 S.W. (2d) 265.*

The Pennsylvania commission, in approving a sale of telephone lines and a plan agreed upon for modification of boundary lines of areas served, stated that the general policy of the commission with respect to duplication of facilities of public utilities is that it is unnecessary and unwarranted, although individual cases may arise where duplication of facilities may be desirable in the public interest. *Re Bell Telephone Co. of Pennsylvania et al. (Application Docket No. 56293).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS, AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 29 P.U.R.(N.S.) NUMBER 1

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PUBLIC UTILITIES REPORTS

WASHINGTON SUPREME COURT

State ex rel. Model Water & Light Company

v.

Department of Public Service of Washington et al.

[No. 27443.]

(— Wash. —, 90 P. (2d) 243.)

Rates, § 648 — Evidence — Presumption as to filing.

1. It must be assumed until the contrary is shown that a public utility company complied with the statute requiring it to file with the Commission schedules showing all rates and charges made, all forms of contract, and all rules and regulations relating to rates, charges, and service, p. 7.

Rates, § 192 — Contracts — Presumption as to legality.

2. A rate fixed by contract is deemed to have been a lawful scheduled rate during the term of the contract where there is no evidence that the utility company did not file the agreement or that the rate prescribed was ever challenged in the manner provided by law, p. 7.

Reparation, § 32 — Scheduled rate as bar.

3. A challenge of a scheduled rate affects the rate only from the date of the filing of the complaint, and there can be no reparation for alleged excessive charges imposed prior to that time, p. 7.

Discrimination, § 17 — Difference in rates — Similarity of conditions.

4. Unlawful discrimination by reason of charging one customer more than another is not proven when the complainant fails to prove that the conditions

of service were substantially the same or that the charges to which the customer was subjected were not just, fair, reasonable, and sufficient, or, conversely, that the rate under which the other customers purchased service was the just, fair, and reasonable rate to be charged for service to the complainant, p. 7.

Rates, § 185 — Reasonableness — Burden of proof.

5. The burden of proving that rates which have become effective are unreasonable ordinarily rests upon the party attacking them, p. 8.

Appeal and review, § 32 — Commission decision — Conclusiveness.

6. Findings of the Department of Public Service are to be given the same weight accorded to any impartial tribunal and may not be overturned unless the clear weight of the evidence is against its conclusions, or unless it has mistaken the law applicable to the matter adjudicated, or unless the findings show evidence of arbitrariness and disregard of the material rights of the parties to the controversy, p. 8.

Rates, § 252 — Schedules — Effectiveness.

7. During the time that rates and standards are in force they are the only lawful rates and standards, p. 9.

Discrimination, § 17 — Rate differences.

8. A mere difference in rates does not of itself constitute an unlawful discrimination, p. 9.

Rates, § 135 — Reasonableness — Comparison.

9. A comparison of rates may be persuasive and may be controlling, but only when it is also shown that the conditions are comparable and that the rates used for comparison are just, fair, reasonable, and sufficient, p. 9.

Reparation, § 23 — Grounds — Discrimination.

10. Mere discrimination is not of itself sufficient to call for reparation, however much it may call for some other remedy or disciplinary measures against the public utility company, p. 9.

Discrimination, § 17 — Rate differences — Intervention of Commission.

11. The fact that one customer was not put on a schedule rate immediately upon expiration of its contract did not of itself constitute an unlawful discrimination as to another customer which had been put upon the schedule rate, where the company had endeavored to effect a change of rate but was temporarily prevented from so doing by the Department of Public Works; it was not incumbent upon the utility voluntarily and immediately to reduce the effective rate as to all consumers merely because temporarily it had been suspended by the Department as to one or two consumers, p. 9.

Payment, § 53 — Gross and net rates — Validity.

12. A provision for a gross rate in the event that payment is not made promptly is, within reasonable limits, valid, p. 9.

Reparation, § 23 — Grounds — Discriminatory imposition of penalty.

13. Imposition upon a customer of a penalty for slow payment does not furnish a basis of reparation even though the penalty provision is not applied to other consumers, since the proper remedy is not to remove it altogether, but to compel its observance uniformly, p. 10.

STATE EX REL. MODEL W. & L. CO. v. DEPT. OF PUBLIC SERVICE

APPEAL from judgment sustaining findings of the Department of Public Service against a claim for alleged overcharges; affirmed.

APPEARANCES: Ed. Peirce, of Opportunity, for appellant; G. W. Hamilton, Don Cary Smith, and Fred J. Lordan, all of Olympia, for respondent Department of Public Service; Post, Russell, Davis & Paine, of Spokane, for respondent Washington Water Power Co.

STEINERT, J.: Relator herein, The Model Water & Light Company, as plaintiff, began this proceeding against The Washington Water Power Company, as defendant, on June 10, 1933, by filing with the Department of Public Works, now the Department of Public Service, of the state of Washington, a complaint seeking relief with respect to certain alleged illegal charges for electrical energy which defendant had supplied to plaintiff during the period from September 1, 1916, to May 1, 1933. No hearing having been had on the complaint, plaintiff on June 6, 1936, filed a supplemental complaint with the Department seeking relief with respect to similar and other alleged illegal charges and overcharges for power service supplied to it by defendant during the period from May 1, 1933, to May 1, 1936. A hearing was had on both complaints on November 19, 1936, and on July 7, 1938, the Department made its findings and entered its order dismissing the proceedings. A writ of review was then obtained from the superior court of Thurston county, and, upon a hearing by the court, a judgment was entered sustaining the findings of the Department and dismissing the review with prejudice. The plaintiff thereupon appealed to this court.

In its brief, relator presents to us twenty questions for adjudication. It will not be necessary to treat each question separately, since our determination of what we consider to be the controlling questions will dispose of all the rest.

Relator's claim with respect to illegal charges and overcharges is based upon an alleged unjust rate discrimination through which relator was charged more for electrical power than were other irrigation companies, under circumstances and conditions which are asserted to have been substantially the same. We will state the facts necessary to illustrate the basis of the complaint.

The Washington Water Power Company, which hereinafter will be referred to as if it were the sole respondent, has for many years been a public service company engaged in the business of generating, distributing, and selling electrical energy for power, lighting, and domestic uses throughout eastern Washington and parts of Idaho. It maintains a transformer station at the town of Opportunity in this state and a network of transmission lines in that vicinity.

Relator, The Model Water & Light Company, which hereinafter will be referred to either as relator or as the Model Company, is a Washington corporation engaged as a mutual service company in maintaining and operating

the water system of Trelomo Irrigated District, which comprises about four hundred acres of land near Opportunity, in the Spokane valley. The land, which had previously been acquired by the relator, was originally surveyed in 10-acre tracts, capable of further subdivision, and was held by relator for resale to persons interested in orchard culture. Relator's capital stock consisted of one thousand shares of the par value of $1 each. As the tracts were sold, a proportionate part of the stock accompanied each sale. About thirty-five or forty families inhabit Trelomo Irrigated District.

Relator's water system was installed in 1911 for the purpose of supplying water for irrigation and domestic uses to each of the tracts. The system consists of a well, three electrically driven pumps, and the necessary water conduits. The maximum monthly amount of electricity used by relator during its irrigation seasons was about 150 kilovolt amperes. Throughout the entire time involved in this controversy, the point of delivery of electricity to relator was at its own premises, the meters being installed at the panels of its well. Respondent absorbed all line losses incident to the service.

From 1911 to 1916, electrical power for irrigation and domestic use was furnished by respondent to relator, under a 5-year contract, at rates therein specified; those rates are not in controversy here.

At the expiration of the contract on June 1, 1916, relator entered into a 10-year contract with respondent for electrical energy upon the following:

"Schedule of Rates and Discounts

"First 50 kilowatt hours (or less) per month, per kilovolt ampere of maximum demand per month, $4.50.

"Excess over 50 kilowatt hours per month, per kilovolt ampere of maximum demand per month, at ½ cent per kilowatt hour.

"With the following discounts:

First	$50.00, net	
Second	50.00, 10%	discount
Second	100.00, 20%	"
Third	100.00, 30%	"
Fourth	100.00, 40%	"
Over	400.00, 50%	" ."

The contract further provided that the consumer should pay, as a minimum bill for each irrigation season consisting of four months, the sum of $12 per kilovolt ampere of the maximum demand during the season, and, for domestic service, a minimum bill of $5 per kilovolt ampere per month of the maximum demand for the month, during the remaining eight months of each year.

At the expiration of the second contract on June 1, 1926, the parties mutually agreed that it should be extended to October 1, 1926, at which time relator was given the option of entering into a third contract or else of taking service at respondent's published tariff then on file with the department. Relator elected to accept the tariff rate.

It appears that, during the period of the 10-year contract, relator had supplied the various owners of tracts in the district with electricity for domestic use at a flat rate. Respondent objected to the continuance of this practice, and insisted that meters be installed and that such service be purchased at the same rate as that which applied to other domestic users in the Spokane valley. Relator was unwilling to assume the expense necessary to conduct that part of its business on a meter basis, and, as a result of nego-

tiations between the parties, relator on October 1, 1926, sold its lighting system to respondent. The irrigating system, however, was retained by relator.

From October, 1926, to January 1, 1929, respondent charged relator for irrigation power service according to the rates specified in its Schedule 23, filed with the Department, and from January 1, 1929, to March 1, 1931, at the rate specified in its Schedule 44, likewise filed. On March 1, 1931, respondent's Schedule 46 became effective. That schedule, which is the only one appearing in the record, sets forth the following:

"Rate:

First 40 kw. hr. per kva. of demand per month, 5¢ net or 5.5¢ gross per kw. hr.
Next 60 kw. hr. per kva. of demand per month, 3¢ net or 3.3¢ gross per kw. hr.
Next 100 kw. hr. per kva. of demand per month, 1¢ net or 1.1¢ gross per kw. hr.
All over 200 kw. hr. per kva. of demand per month, 0.75¢ net or 0.825¢ gross per kw. hr.

"Quantity Discount:

"The following quantity discounts are based on the net monthly bill:

	Net
First $200.00	$200.00
Next $100.00, 20% discount	80.00
Next $100.00, 30% discount	70.00
All over $400.00, 40% discount."	

The schedule further provided that the net rates above given should apply only in case payment was made in full within fifteen days after the bill was rendered; otherwise, the gross rates therein specified should apply.

At all times since March 1, 1931, service has been supplied to relator by respondent on the basis of Schedule 46.

In May, 1933, relator owed respondent the sum of $1,640 for past service supplied according to the rates charged. Relator thereupon gave respondent its promissory note in that amount. Likewise, in April, 1936, relator, for the same reason, gave respondent its promissory note for $2,800. Neither of those notes has been paid.

According to the computation made by relator, as it appears in the record, the amount, including the two notes, owing by it to respondent on May 1, 1936, on the basis of the rates actually charged, was $4,365.11. Relator, however, complains that during the entire period of service from 1916 to 1936 it was subjected to illegal charges and was overcharged a total amount, according to its computation, of $7,399.75. The difference, amounting to $3,034.64, it seeks to have applied as a future credit.

The overcharges claimed by relator are based upon alleged discriminatory rates for the same character of service rendered by respondent to two other water companies operating in the vicinity of Opportunity during the same period of time. It is, therefore, necessary to state the facts with reference to those companies.

Adjoining Trelomo Irrigated District, which is operated by relator, is the Opportunity Water District comprising about 2,875 acres of land and operated by Modern Electric Water Company, which we will refer to hereinafter as the Modern Company. About three-quarters of a mile distant is the Vera Water District containing about 2,200 acres and operated by Vera Light & Water Company, which we will refer to hereinafter as the Vera Company. The Modern Company maintains seven wells and ten

or more pumps; the Vera Company maintains four wells and five or more pumping plants. At all times, however, their current was metered at respondent's transformer station; hence all line losses were necessarily borne by the Modern and Vera Companies. The two companies together used from 2,300 to 2,700 kilovolt amperes per month during the irrigation season.

In 1915, respondent and the Modern Company entered into a written contract wherein respondent agreed to furnish to the Modern Company electrical energy for general irrigation purposes for a period of seven years, with an option to the Modern Company to extend the contract for ten additional years. Under that contract, power was supplied for both the Opportunity and the Vera districts as one account. The contract provided the following:

"Schedule of Rates and Discounts

First 20 kw. hr. per month or less per kva. of maximum demand per month, $1.50.
Next 30 kw. hr. per month or less per kva. of maximum demand per month, 3¢ per kw. hr.
Next 50 kw. hr. per month or less per kva. of maximum demand per month, 1½¢ per kw. hr.
Next 300 kw. hr. per month or less per kva. of maximum demand per month, 1¢ per kw. hr.
Over 400 kw. hr. per month or less per kva. of maximum demand per month, ½¢ per kw. hr.

"With the following discounts:

First	$50.00, net	
Second	50.00, 10%	discount
Second	100.00, 20%	"
Third	100.00, 30%	"
Fourth	100.00, 40%	"
Over	400.00, 50%	" ."

The contract further provided that the consumer would pay a minimum monthly bill of $1,200 from May to August of each year and a minimum monthly bill of $300 for the remaining months of each year. The contract also provided that the Modern Company should furnish to respondent, free of charge, water for cooling its transformers; this item amounted to about $40 or $50 per month during the irrigation season and a lesser, but appreciable amount, during the remainder of the year.

In 1922, the Modern Company exercised its option to extend its contract for ten additional years. After the contract had fully expired, in September, 1932, respondent indicated that it would put both the Modern Company and the Vera Company on the rate specified in its Schedule 46. However, at the instance of the Department, which was then conducting a general rate investigation, the former rates prescribed by the Modern contract were continued during the irrigation season of 1933. On February 21, 1934, contracts were made between respondent and the two companies providing for irrigation power at the net rates prescribed in Schedule 46, but with no reference made therein to gross rates in the event of failure to pay the bills within fifteen days after their rendition. Since that time, the Modern and Vera Companies have been charged according to the rates set forth in the 1934 contracts.

It is apparent, from what we have recited above, that the rates charged relator according either to its contract of 1916 or to Schedule 46 were greater than those charged the Modern and Vera Companies under their contract of 1915. It is also apparent that the conditions under which the respective charges were made differed substantially, in the following particulars: (a) Amount of consumption, (b)

point of delivery, and (c) supply of water to respondent for cooling its transformers.

Our disposition of the fundamental questions here involved necessitates a division of the time for which overcharges are claimed by relator into three periods: (1) From June 1, 1916, the date of relator's second contract, to June 10, 1933, the day on which its complaint was filed with the Department; (2) from June 10, 1933, to March 1, 1934, the day on which the final contracts with the Modern and the Vera Companies became effective; and (3) from March 1, 1934, to May 1, 1936.

[1, 2] The claim for alleged overcharges during the first period is concluded by the law of this state. Rem. Rev. Stat. § 10363, requires every water company, and certain other public utilities, to file with the Public Service Commission schedules showing all rates and charges made, all forms of contract, and all rules and regulations relating to rates, charges, and service. Rem. Rev. Stat. § 10364, prohibits any change in rate or charge, or in any form of contract, or in any rule, or regulation relating to rate, charge or service, except upon thirty days' notice to the Commission and thirty days' publication thereof, or unless the Commission shall order otherwise.

It must be assumed, until the contrary is shown, that respondent complied with the statute. There is no evidence here that respondent did not file a form of agreement such as was made with Model Company in 1916, or that the rate prescribed in that contract was ever challenged in the manner provided by law. That rate was, therefore, a lawful, scheduled rate during the term of the contract. Thereafter, the rate charged was fixed by Schedule 46, which was never challenged until June 10, 1933, when the complaint in this proceeding was filed.

[3] It is now settled law in this jurisdiction that when a scheduled rate is challenged, the challenge affects the rate only from the date of the filing of the complaint, and there can be no reparation for alleged excessive charges imposed prior to that time. Pacific Coast Elevator Co. v. Department of Public Works (1924) 130 Wash. 620, P.U.R.1925B, 618, 228 Pac. 1022; Puget Sound Nav. Co. v. Department of Public Works, 157 Wash. 557, P.U.R.1930E, 289, 289 Pac. 1006, affirmed, en banc (1931) 160 Wash. 703, 295 Pac. 949; State ex rel. Standard Oil Co. v. Department of Public Works (1936) 185 Wash. 235, 12 P.U.R.(N.S.) 229, 53 P.(2d) 318; State ex rel. Albers Bros. Milling Co. v. Department of Public Service (1939) — Wash. —, 27 P.U.R. (N.S.) 318, 86 P. (2d) 196.

This disposes of the claim made for alleged overcharges during the first period.

[4] Relator's claim for overcharges alleged to have been made during the second period, beginning with the filing of its original complaint, is rested upon the fact that Model Company was charged on the basis of the rate prescribed by Schedule 46, while the Modern and Vera Companies still were being charged on the basis of the lesser rates prescribed by the original Modern Company contract of 1915, which expired in 1932. Relator's contention is based on Rem. Rev. Stat. § 10367, which provides: "No gas

company, electrical company, or water company shall, directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person or corporation a greater or less compensation for gas, electricity, or water, or for any service rendered or to be rendered, or in connection therewith, except as authorized in this act, than it charges, demands, collects, or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions."

In connection with that section, there must also be read Rem. Rev. Stat. § 10368, which provides: "Nothing in this act shall be taken to prohibit a gas company, electrical company, or water company from establishing a sliding scale of charges, whereby a greater charge is made per unit for a lesser than a greater quantity for gas, electricity, or water, or any service rendered or to be rendered."

The answer to relator's present contention is that it failed to prove that the conditions under which Model Company was served were substantially the same as those under which the other two companies were served, or that the charges to which Model Company was subjected were not, in the language of Rem. Rev. Stat. § 10362, "just, fair, reasonable, and sufficient," or, conversely, that the rate under which the Modern and Vera Companies purchased was the just, fair, and reasonable rate to be charged for service to Model Company. This answer would likewise apply to the alleged overcharges during the first period above mentioned, were they not already disposed of by what we previously have said.

[5] The burden of proving that rates which have become effective are unreasonable ordinarily rests upon the party attacking them. State ex rel. Seattle v. Public Service Commission (1913) 76 Wash. 492, 136 Pac. 850; North Coast Power Co. v. Kuykendall (1921) 117 Wash. 563, P.U.R.1922B, 320, 201 Pac. 780.

[6] The Department found that relator had not met the burden in the respects above noted. The findings of the Department are to be given the same weight accorded to any impartial tribunal, and may not be overturned unless the clear weight of the evidence is against its conclusions, or unless it has mistaken the law applicable to the matter adjudicated, or, as sometimes expressed, unless the findings show evidence of arbitrariness and disregard of the material rights of the parties to the controversy. State ex rel. Great Northern R. Co. v. Railroad Commission (1910) 60 Wash. 218, 110 Pac. 1075; Puget Sound Electric Railway v. Railroad Commission (1911) 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763; State ex rel. Great Northern R. Co. v. Public Service Commission (1913) 76 Wash. 625, 137 Pac. 132; State ex rel. B. & M. Auto Freight v. Department of Public Works, 124 Wash. 234, P.U.R.1923E, 101, 214 Pac. 164; Pacific Coast Elevator Co. v. Department of Public Works (1924) 130 Wash. 620, P.U.R.1925B, 618, 228 Pac. 1022; Great Northern R. Co. v. Department of Public Works (1931) 161 Wash. 29, 296 Pac. 142; State

ex rel. Puget Sound Power & Light Co. v. Department of Public Works (1935) 181 Wash. 105, 8 P.U.R. (N.S.) 461, 42 P. (2d) 424.

[7] During the time that rates and standards are in force they are the only lawful rates and standards. Northern P. R. Co. v. Department of Public Works (1925) 136 Wash. 389, P.U.R.1926B, 233, 240 Pac. 362; Puget Sound Nav. Co. v. Department of Public Works, *supra;* State ex rel. Standard Oil Co. v. Department of Public Works, *supra;* State ex rel. Albers Bros. Milling Co. v. Department of Public Service, *supra.*

[8, 9] A mere difference in rates does not, of itself, constitute an unlawful discrimination. State ex rel. Puget Sound Power & Light Co. v. Department of Public Works, *supra.* A comparison of rates may be persuasive and may be controlling, but only when it is also shown that the conditions are comparable and that the rates used for comparison are just, fair, reasonable, and sufficient. Logan City v. Public Utilities Commission, 77 Utah, 442, P.U.R.1931C, 5, 296 Pac. 1006.

[10] Furthermore, mere discrimination, if there be such, is not, of itself sufficient to call for reparation, however much it may call for some other remedy or disciplinary measures against the public utility company. Oregon-Washington R. & Nav. Co. v. Department of Public Works (1929) 151 Wash. 142, 275 Pac. 87.

[11] The fact that the Modern Company was not put on the schedule rate immediately upon the expiration of its 1915 contract did not, of itself, under the circumstances, constitute an unlawful discrimination as to relator. Respondent had endeavored to effect a change of rate but was temporarily prevented from so doing by the Department. When the general investigation of rates was completed, respondent was permitted to enforce the schedule rate, thus indicating that its previous attempt was well founded. It was not incumbent upon respondent voluntarily and immediately to reduce the effective rate as to all consumers merely because, temporarily, it had been suspended by the Department as to one or two consumers. The peculiar facts relative to the particular circumstance would not support a finding of unlawful discrimination as to relator during that interim.

We are unable to discover wherein the Department erred in its findings or conclusions. On the contrary, we believe that they are fully sustained by the evidence. This disposes of the second portion of relator's claim.

[12] During the third and final period of alleged illegal charges the *net rates* of Schedule 46 applied not only to Model Company, but also to the Modern and Vera Companies. The only matter, therefore, that need be considered with reference to this phase of the controversy is the provision peculiar to the schedule under which Model Company is operating, wherein a *gross* rate is imposed in the event that payment is not made within fifteen days after the bill for service has been rendered. The contract of March 1, 1934, made with the Modern and Vera Companies did not include that provision.

Relator contends, first, that such a provision is, in any event, unlawful, because it is a penalty, and, second, that, if lawful, it cannot be required

of one class of consumers and not of another.

Upon the first contention, we are clearly of the opinion that such a provision, within reasonable limits, is valid. Its purpose is to place a premium upon the prompt payment of bills, for in that way efficiency in service is promoted. The Public Service Commissions of thirty, or more, states of the Union have expressed that view, as may be found by reference to the published Public Utility Reports. In Arizona Corp. Commission v. Bisbee-Naco Water Co. (1912, 1913) 1 Ann. Rep. Ariz. C. C. 489, it was held that a premium should be placed upon the prompt payment of bills and a penalty assessed against delayed payments, since under proper regulation these moneys are, indirectly at least, technically the property of all the consumers, and if payments are unduly delayed, it is necessary that the working capital of the utilities be constructed from receipts derived from other sources.

This court has upheld a similar practice on the part of telephone companies. State ex rel. MacMahon v. Independent Teleph. Co. (1910) 59 Wash. 156, 159, 109 Pac. 366, 367, 31 L.R.A.(N.S.) 329. In that case, this court used this very pertinent language: "Manifestly, if all the subscribers of appellant continuously refused to pay their rentals in advance, and thus necessitated the employment of collectors, additional office force, and the incurring of other expenses incident to the collection of such rentals, the moneys thus expended must be taken from the revenues of the company, and thus impair a fund to which the company must look for the expenditure necessary to keep its plant in the highly efficient condition required and demanded because of the public nature of the service. It is therefore not unreasonable that the company adopt a rule and enforce a regulation providing for the payment of its rentals in advance, and for an additional charge in case such requirement is not complied with. Such a charge is not an addition to the maximum rate provided for in the franchise. It is rather a charge for default and delinquency, which may be avoided by a compliance with the reasonable regulation for the payment of rentals in advance." Cf., Tacoma Hotel Co. v. Tacoma Light & Water Co. (1891) 3 Wash. 316, 28 Pac. 516, 14 L.R.A. 669, 28 Am. St. Rep. 35.

Cases from other jurisdictions holding the same view are the following: Traverse City v. Citizens' Teleph. Co. (1917) 195 Mich. 373, 161 N. W. 983; State ex rel. Latshaw v. Water & Light Comrs. (1908) 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581; Com. ex rel. Roman Catholic High School v. Philadelphia (1890) 132 Pa. 288, 19 Atl. 136; Girard Life Insurance Co. v. Philadelphia (1879) 88 Pa. 393; Bower v. United Gas Improv. Co. (1908) 37 Pa. Super. Ct. 113.

[13] Upon the second contention under this heading, what we have already said with reference to the proper remedy to be pursued in case a scheduled rate is not uniformly applied, is particularly pertinent here. If the penalty provision should be applied to all other consumers as well as to relator, and we see no reason why it should not be so applied, then the proper remedy is not to remove it altogether, but to compel its observance

uniformly. That, however, does not furnish a basis of reparation to relator. This disposes of the remainder of relator's claim.

The judgment is affirmed.

Blake, C. J., and Main, Robinson, and Jeffers, JJ., concur.

SECURITIES AND EXCHANGE COMMISSION

Re Central Maine Power Company

[File No. 32-118, Release No. 1462.]

Security issues, § 13.2 — Exemption under Holding Company Act — Subsidiary financing.

1. The statutory requirement for exemption of the issuance and sale of securities of a subsidiary of a registered holding company, under § 6(b) of the Public Utility Holding Company Act of 1935, is met when securities to be issued by a subsidiary are to refund outstanding bonds, to pay outstanding bank notes, to reimburse the treasury for construction expenditures, and to complete necessary additions and improvements to public utility properties, even though the proposed financing will also aid the applicant to pay dividend arrearages on preferred stock by freeing internal cash, reimbursing its treasury for construction expenditures, and otherwise, p. 17.

Security issues, § 110 — Preëmptive offering of common stock — Detriment to parent corporation stockholder.

2. A preëmptive offering of common stock by a subsidiary corporation at a price above the value of the stock does not materially prejudice a preferred stockholder of the parent corporation, which will take unsubscribed stock, where the maximum sales to outsiders on a pro rata basis would yield only 4.2 per cent of the aggregate stock proceeds through exercise of preëmptive rights, p. 17.

Security issues, § 110 — Preëmptive rights to stock — Offering price.

3. Imposition of any condition upon the offering price of common stock, to give substance to preëmptive rights of a limited number of stockholders other than a parent corporation, is unnecessary when it is questionable whether the public stockholders would exercise such rights in any event in view of the facts that dividends on preferred stock are in arrears and future dividends on common stock are purely a matter of conjecture, p. 17.

Security issues, § 120 — Offer of common stock — Disclosure of value — Preëmptive offering.

4. Imposition of terms or conditions with respect to further disclosure of the probable value of common stock in connection with a preëmptive offering to present stockholders was held to be neither necessary nor advisable where the corporation was making no real attempt to effect a public distribution of the common stock, but was essentially merely complying with

the technical requirements of preëmptive rights, which on a previous issue had resulted in only one share offered being purchased by public holders of stock as distinguished from purchases by the parent corporation, p. 18.

Security issues, § 15.1 — Jurisdiction of Federal Commission — Terms and conditions — Exemption of subsidiary offering.

5. The Securities and Exchange Commission, in passing upon an application for exemption of a subsidiary corporation's stock issue and sale from provisions of § 6(a) of the Public Utility Holding Company Act of 1935, has no jurisdiction over the parent corporation and has power merely to attach terms and conditions to the proposed issuance of securities by the applicant; and no terms and conditions would be relevant to such proceeding which would protect the interests of preferred stockholders of the parent corporation allegedly in jeopardy because of the policy of the parent corporation in making substantial investments in the common stock of the applicant, p. 18.

Security issues, § 15 — Powers of Federal Commission — Exemption proceedings — Question of corporate structure and voting rights.

6. The Securities and Exchange Commission, in passing upon an application by a subsidiary of a registered holding company for exemption from the provisions of § 6(a) of the Public Utility Holding Company Act of 1935, in connection with a stock issue, has no power to decide whether or not the corporate structure of the parent corporation or its system requires corrective action under § 11(b)(2) of the act (relating to voting rights of stockholders) or to take any action designed to correct such maldistribution of voting power as may exist, p. 18.

Security issues, § 129 — Exemption from Holding Company Act — Subsidiary stock issue — Delay to investigate stock voting power.

7. Disposition by the Securities and Exchange Commission of an application by a subsidiary of a registered holding company for exemption of a stock issue from § 6(a) of the Public Utility Holding Company Act of 1935 should not be deferred until a determination has been made as to the necessity of recapitalization and correction of a maldistribution of voting power under § 11(b)(2) of the act, but such matters should await institution of appropriate proceedings under § 11, p. 18.

[March 7, 1939.]

APPLICATION *by subsidiary of registered holding company for exemption of the issue and sale of bonds and stock from provisions of § 6(a) of the Public Utility Holding Company Act of 1935; application granted.*

By the COMMISSION: Central Maine Power Company, a Maine corporation, and a subsidiary of New England Public Service Company (hereinafter referred to as Nepsco) a registered holding company, has filed an application and amendments thereto for the exemption from the provisions of § 6 (a) of the Public Utility Holding Company Act of 1935 of the issue and sale by it of:

(1) First and general mortgage bonds, series J 3½ per cent due 1968, dated December 1, 1938, and maturing

December 1, 1968, in the principal amount of $4,500,000; and

(2) 5,000 shares of common stock no-par value at the price of $100 per share.

Section 6 (b) of the act provides that the Commission shall exempt from the provisions of § 6 (a) "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers," the issue and sale of any security

"by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the state Commission of the state in which such subsidiary is organized and doing business, . . ."

A hearing on the amended application was duly held after appropriate notice. The applicant and the Commission were represented by counsel at the hearing. Russell B. Stearns, a prior lien preferred stockholder of Nepsco, having been made a party to the proceeding by order of the Commission upon filing an application for leave to intervene, also appeared at the hearing, was represented by counsel, and was heard in opposition to the application. No other member of the public appeared or requested an opportunity to be heard at the hearing. The matter was submitted to the Commission upon briefs in support of requested findings of fact filed by the applicant and the intervener. The record in this matter having been considered, the Commission makes the following findings:

Business of Applicant

The applicant, a public utility company organized under the laws of the state of Maine, furnishes electric light and power service at retail and wholesale in the central and western parts of Maine, including 214 cities and towns with an estimated population of 348,000. In each of the last five years, the applicant has generated more than 90 per cent of its total output in its own hydroelectric plants. For the twelve months ended September 30, 1938, applicant derived about 97.2 per cent of its total operating revenues from the electric business. The balance was derived principally from the sale of manufactured gas.

Purposes of the Proposed Financing

The proposed bonds are to be issued and sold for the purpose of refunding applicant's first mortgage 30-year 5 per cent gold bonds due November 1, 1939, outstanding in the principal amount of $3,303,000[1] and to permanently finance bank loans of the applicant outstanding in the principal

[1] Applicant will deposit cash with the State Street Trust Company, trustee under the first mortgage indenture, in an amount sufficient to pay the principal and interest to maturity of the outstanding first mortgage bonds. This fund is to be deposited by said trustee with the First National Bank of Boston to be drawn upon by said trustee only to pay bonds as they are presented. State Street Trust Company will execute a release of the first mortgage, and it will be discharged, immediately upon delivery of the cash. However, in the opinion of the counsel for the applicant, the first and general mortgage bonds will not be strictly a first lien until the first mortgage bonds are either paid in full or until the maturity date of the first mortgage, whichever occurs first. Appropriate steps will be taken by the applicant and State Street Trust Company to notify the first mortgage bondholders of their right to receive immediate payment of their bonds.

amount of $1,000,000 heretofore made to the applicant by The First National Bank of Boston. It appears that such loans were incurred and the proceeds used in general by the applicant for the purchase and construction of its public utility properties. According to the applicant any balance of the proceeds then remaining will be used for the purchase and construction of additional property useful in the conduct of applicant's business as a public utility company.

The proposed issue of common stock will first be offered to the public holders of applicant's common and 6 per cent preferred stock in accordance with their preëmptive rights on a pro rata basis of one share for every 27.2702 shares outstanding, whether common or preferred, then held by such stockholders. The offering will be at a price of $100 per share. Certain problems are presented by reason of the offering price of such shares which will be hereinafter discussed in more detail. Applicant states that it has an agreement, not expressed in writing, with Nepsco, whereby the latter has agreed to accept, in payment of advances of $500,000 in cash made by it to the applicant, all or any part of the 5,000 shares of the proposed common stock on the basis of $100 per share. Should any part of such shares be taken by the holders of stock having preëmptive rights, the proceeds of such sales will be applied in full by the applicant to the reduction of such advances. It appears that these advances were made in furtherance of a plan formulated by executive officers of Nepsco after a study of the financial requirements of Central Maine Power Company, and submitted to its board of directors, whereby Nepsco would assist the applicant in every way possible to meet such requirements. As forecast by the plan, these requirements included the refunding of the outstanding first mortgage 30-year 5 per cent gold bonds of the applicant; the permanent financing of its short-term loans; and the payment of the dividend arrearages on applicant's preferred stock. The plan contemplated that Nepsco would assist the applicant in meeting these requirements by advancing substantial sums which were to be repaid by the issuance of applicant's common stock. In the furtherance of this policy Nepsco advanced $500,000 to the applicant early in 1938, and was repaid in common capital stock. The instant application concerns a similar advance. Nepsco contemplates that an additional advance of $500,000 will be made sometime during 1939. It will be noted, therefore, that the present advance is but part of the plan whereby Nepsco will in all invest $1,500,000 in the applicant's common stock for the purpose of aiding the applicant in meeting its financial requirements.

According to the applicant the advances with which the present application is concerned have been used by it to reimburse its treasury for construction expenditures and to reduce outstanding bank loans.

The resolutions of the board of directors of Nepsco authorizing the advances specified that they were to be repaid in the common stock of the applicant. The advances were, therefore, actually prepaid investments in such stock.

Capitalization of the Applicant

The capitalization of the applicant including surplus and current notes payable both before and after the proposed financing is as follows:

	September 30, 1938			
	Actual		Pro Forma	
	Amount	%	Amount	%
First mortgage 5% bonds, 1939	$ 3,368,000[2]	5.3	$	...
First and general mortgage, series G 4%, 1960	16,600,000	26.3	16,600,000	26.2
First and general mortgage, series H 3½%, 1966	14,000,000	22.2	14,000,000	22.1
First and general mortgage, series J 3½%, 1968	.....	...	4,500,000	7.1
Notes payable to banks	1,225,000[3]	1.9	.....	...
Notes payable to bearer	295,000	0.5	295,000	0.5
7% Cumulative preferred stock, $100 par	11,199,000	17.7	11,199,000	17.6
6% Cumulative preferred stock, $100 par	635,100	1.0	635,100	1.0
	Actual		Pro Forma	
	Amount	%	Amount	%
$6 Cumulative preferred stock, $100 par	$7,919,100	12.5	$7,919,100	12.5
Common stock, no par	3,000,000[4]	4.7	3,700,000	5.8
Capital surplus	1,321,620	2.1	1,321,620	2.1
Contributed surplus	1,425,382[4]	2.3	1,225,382	1.9
Earned surplus	2,178,739	3.5	2,031,589[5]	3.2
Total	$63,166,941	100.0	$63,426,791	100.0

A summary of the above table is shown as follows:

	September 30, 1938			
	Actual		Pro Forma	
	Amount	%	Amount	%
Bonds and notes	$35,488,000	56.2	$35,395,000	55.9
Preferred stock	19,753,200	31.2	19,753,200	31.1
Common stock	3,000,000	4.7	3,700,000	5.8
Surplus	4,925,741	7.9	4,578,591	7.2
Total	$63,166,941	100.0	$63,426,791	100.0

All classes of applicant's stocks have voting rights at present because of arrearages in dividends, but normally only the 6 per cent preferred stock has a vote, together with the common stock. At present, dividends are in arrears to the extent of 1⅛ times the annual requirements of each class of preferred stock, or an aggregate of approximately $1,460,000.

As at September 30, 1938, there were 130,000 shares of applicant's common stock outstanding, of which Nepsco owned 129,979 shares, and the balance of 21 shares were held by the public. Nepsco also owned 638 of the 6,351 shares of applicant's 6 per cent preferred stock then outstanding. Of the various classes of applicant's stock outstanding only the common stock

[2] Subsequently reduced through sinking fund by $65,000 to $3,303,000.

[3] Subsequently reduced by $225,000 to $1,000.000.

[4] Subsequently changed by transfer of $200,000 from contributed surplus to common stock capital.

[5] This figure reflects the following charges to be made to earned surplus:

(a) Proportion of expense of issuance allocated to common stock	$6,550
(b) Balance of unamortized debt discount and expense applicable to first mortgage 5 per cent bonds, 1939	2,975
(c) Duplicate interest on $3,303,000 principal amount of bonds at 5 per cent for 10 months	137,625
Total	$147,150

and 6 per cent preferred stock are entitled to preëmptive rights.

Objections of the Intervener

The substance of the objections of the intervener to the instant application may be summarized as follows:

1. One of the purposes of the proposed financing is to enable the applicant to pay the dividend arrearages on its preferred stock. In view of that fact the proposed financing cannot be said to be solely for the purpose of financing the business of the applicant within the meaning of the statute.

2. The proposed offering price of the common stock is in excess of the value of such stock and therefore in effect deprives the public stockholders of Central Maine Power Company of their opportunity to subscribe to the common stock. This places the burden of common stock financing on Nepsco to the detriment of the interests of Nepsco's preferred stockholders.

3. Investments by Nepsco in the common stock of the applicant result in gross unfairness to Nepsco's preferred stockholders. Such advances are in reality a "gift," according to intervener, of the assets belonging to the preferred stockholders of Nepsco. They are to be made although the only members of the Board (two out of twenty) who are primarily interested in the preferred stock voted against making them. They are part of a general program of diverting funds from Nepsco to subsidiaries which has been adopted by the common stock directors of Nepsco. These directors do not represent any class of security holders which has a financial stake in the enterprise; on the contrary, the common stock which they represent has no equity whatsoever in Nepsco.[6]

In conclusion the intervener prays that:

1. The application be denied since it does not qualify under the provisions of § 6 (b) of the act.

2. In the event that the above prayer is denied, certain terms and conditions be imposed on the issuance of such securities to ensure that the interests of the security holders of the applicant and Nepsco are protected.

3. The present proceedings be continued pending action relative to the redistribution of voting power among

[6] In support of his objections the intervener presented evidence to the effect that: no dividends have been paid on the various classes of Nepsco's preferred stock since 1932; as at December 31, 1937, these dividend arrearages totaled $12,590,806; the subsidiaries of Nepsco during the years 1932–37, inclusive, have had earnings available to Nepsco amounting to only $8,540,000, and during this same period only $3,223,384 has been received by Nepsco as dividends from such subsidiaries; the assets at book value according to the balance sheet of Nepsco as at the same date, fall short by nearly $3,750,000 of an amount necessary to give the common stock any value. The intervener also endeavored to show that, despite the voting rights of Nepsco's preferred stock due to dividend arrearages, the common stockholders remain in complete control of its board of directors, its management, and the formulation of its financial policies; that only two of the twenty directors on Nepsco's board may be said to be primarily interested in the preferred stockholders of that company; and that seventeen of such directors represent among them 90 per cent of the common stock and only a negligible portion of the preferred stock. As of November 30, 1938, there were 963,990–52/80 shares of common stock outstanding against 382,951 shares of the various classes of preferred stock having voting rights outstanding.

Counsel for the applicant made no attempt to introduce any evidence to refute the contentions of the intervener as to the distribution of the voting power of Nepsco, apparently relying upon his objection to the introduction of such evidence that the need for a recapitalization of Nepsco is not an issue presented by the instant application.

the security holders of Nepsco in accordance with the provisions of § 11 (b) (2) [7] of the act.

Application of Proceeds of Proposed Financing

[1] In regard to the intervener's contention that the proposed financing does not comply with the provisions of the statute, we find that uncontroverted evidence introduced at the hearing in behalf of the applicant establishes that it has full need for the entire proceeds (including the advances of Nepsco already mentioned) of the proposed financing in order to refund its outstanding bonds, to pay its outstanding bank notes, to reimburse its treasury for construction expenditures, and to complete necessary additions and improvements to its public utility properties. In this connection the record shows that the applicant is presently completing the construction of a hydroelectric station at Solon, Maine; that this development was begun about two years ago with the purchase of the site and, when completed in the near future, will represent an investment of over $2,000,000. In addition, it appears that applicant's construction budget for this year will amount to between $700,000 and $900,000. These appear to be bona fide purposes of applicant's business. The statutory requirement is therefore met, even though the proposed financing will also aid the applicant to pay the dividend arrearages on its preferred stock, by freeing internal cash, reimbursing its treasury for construction expenditures, and otherwise.

Preëmptive Offering of Common Stock

[2, 3] As indicated above, the intervener objects to the proposed preëmptive offering of applicant's common stock on the ground that (a) the offering price is unfair; and (b) the excessive price of the stock places the burden of common stock financing on Nepsco to the detriment of its preferred stockholders. As to the latter contention, we find that the maximum sales to outsiders on a pro rata basis would be 210 shares yielding 4.2 per cent of the aggregate stock proceeds, since there are only 5,734 shares of stock having preëmptive rights outstanding in the hands of the public. Under such circumstances, it does not appear that the intervener as a preferred stockholder of Nepsco is materially prejudiced by the failure of the management of Nepsco and Central Maine Power Company to make a preëmptive offering of such stock at a lower price. A more serious question is whether the interests of the publicly held stock of Central Maine Power Company require this Commission to give substance to such preëmptive rights, by conditioning its exemption on a more realistic offering. For the purposes of this case it is sufficient to note that it is questionable whether the common and 6 per cent preferred stockholders of the applicant would exercise such rights even if the stock

[7] Section 11(b)(2) of the act provides that it shall be the duty of the Commission, as soon as practicable after January 1, 1938, ". . . to require by order, after notice and opportunity for hearing, that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system. . . ."

were offered to them at a lower price in view of the facts that the dividends on the preferred stock are in arrears and future dividend payments on the common stock are purely a matter of conjecture. The Commission, therefore, does not deem it necessary or advisable to impose any condition upon the offering price of such stock.

[4] The intervener also urges that the applicant make a full disclosure of the probable value of such stock in connection with such preëmptive offering. In this connection the record indicates that the common stock will have a book value of $61.33 [8] per share after the proposed transaction. After subtracting preferred stock arrearages, the adjusted book value will be $50.51 per share. The pro forma income statement of the applicant for the twelve months ending September 30, 1938, indicates a net income applicable to the common stock in the amount of $420,817 [9] or $3.12 per share. Applicant proposes to send a copy of the prospectus to each of the stockholders having preëmptive rights, together with a notice of offering. The disclosure to be made is comparable to that previously made in connection with a similar offering of 5,000 shares of applicant's no-par common stock at the price of $100 per share.[10] In the previous offering only one of the shares so offered was purchased by the public holders of applicant's common and 6 per cent preferred stock. In view of the fact that applicant is making no real attempt to effect a public distribution of the common stock, but is essentially merely complying with the technical requirements of preëmptive rights, this Commission does not deem it necessary or advisable to impose any terms or conditions with respect to further disclosure.

Advances by Nepsco and Position of Intervener

[5] The remaining objections concern the policy of Nepsco in making substantial investments in the common stock of the applicant. Because of technical difficulties it is unnecessary to consider these objections in detail. They relate to the effect of this policy upon the preferred stockholders of Nepsco. It is sufficient to indicate that in these proceedings, this Commission has power merely to attach terms and conditions to the proposed issuance of securities by the applicant. No terms and conditions would be relevant to this proceeding which would protect the interests of Nepsco's preferred stockholders allegedly in jeopardy. Furthermore, this Commission has no jurisdiction over Nepsco in these proceedings.

[6, 7] The intervener, however, takes a position in this connection which deserves further comment. He argues that since the proposed issue and sale of applicant's stock to Nepsco affect the interests of its preferred stockholders this Commission should not permit consummation of the transaction until the preferred stockholders

[8] Stated value ... $3,700,000 or $27.41 per share
Surpluses .. 4,578,591 or 33.92 per share
Total .. $8,278,591 or $61.33 per share

[9] Net income $1,717,999
Annual dividend requirements for preferred stock 1,297,182
Net income applicable to common stock $420,817

[10] See In Re Central Maine Power Co. (1938) File No. 32-861, Holding Company Act Release No. 1109, 3 S. E. C. ——.

of Nepsco are given the voting rights to which the intervener contends they are entitled by § 11 (b) (2) of the act. Then, and only then, according to the intervener, will it be appropriate for Nepsco to determine its policy with respect to this application. Intervener therefore prayed that this Commission withhold final action on the instant application "until the need for reorganization of New England Public Service Company under § 11 (b) can be determined and representatives of the real owners of the business are in control of its affairs."

The present proceeding concerns an application pursuant to § 6 (b) of the act and it is apparent that such application must be decided on its own merits and pursuant to the statutory limits of the Commission's jurisdiction in this respect. It is not within our power to decide in this proceeding whether or not the corporate structure of Nespco or the Nepsco system requires corrective action under § 11 (b) (2) of the act, or to take any action designed to correct such maldistribution of voting power as may exist.

Similarly, we feel that it would be inappropriate to defer disposition of this application until these matters can be dealt with in whatever manner necessary to meet the requirements of § 11 (b) (2) of the act. This must await institution of appropriate proceedings by the applicant or by this Commission under § 11 of the act.

The intervener's prayer that the proceeding be continued pending determination of the necessity of the recapitalization of Nepsco will, therefore, be denied, without prejudice, however, to the Commission's jurisdiction under § 11 (b) (2) [11] of the act.

Proposed Sale of Bonds

Applicant proposes to sell the bonds to a group of underwriters headed by The First Boston Corporation and Coffin & Burr, Incorporated, at 100 and accrued interest and states that the underwriters will offer them to the public at a price of 102 and accrued interest. These prices represent a yield to maturity of 3.39 per cent and cost of money to the applicant of 3½ per cent. The estimated net proceeds from the proposed sale of the bonds (exclusive of accrued interest and after deducting estimated expenses of $27,759) will amount to $4,472,241.

The bonds are to be issued under and secured by an open end indenture of mortgage dated as of June 1, 1921, entered into by the applicant, together with certain other companies, then subsidiary companies of the applicant, as co-mortgagors, and Old Colony Trust Company as trustee, and certain other indentures confirmatory thereof and supplemental thereto; more particularly a supplemental trust indenture thereto dated as of December 1, 1938, by and between the applicant and Old Colony Trust Company as trustee.[12]

Property, Plant, and Equipment

Applicant's gross book value of property, plant, and equipment (in-

[11] See footnote 7, *supra*.

[12] The supplemental indenture of December 1, 1938, contains provisions for a sinking fund as follows: The company covenants that it will pay to the trustee in cash, or bonds at their principal amount, on or before December 1st of each year from 1944 to 1967, inclusive, amounting in the year 1944 to $54,000, and in each year from 1945 to 1959, inclusive, amounting to $56,000, and

cluding intangibles) as at September 30, 1938, was $61,314,853, including $10,499,530 described as "Fixed Capital at June 30, 1915."[13] Net additions subsequent to June 30, 1915, included the properties of acquired utility companies, certain of which were entered on the applicant's books at approximately $461,000 in excess of cost to applicant.[14]

After deducting an amount of $2,327,489 which was transferred to "Fixed Capital at June 30, 1915," from an account entitled "Royalties, Franchises, and Licenses,"[15] and after deducting other intangibles estimated by applicant not to exceed $250,000, and after deducting depreciation reserve of $3,858,205, an adjusted net book value of tangible plant, property, and equipment of $54,879,160 is obtained. Adding $2,073,758 of "Property Held in Fee for Future Development" which property is also subject to the lien of the mortgage, the total adjusted net tangible property based on the books of the applicant amounted to $56,952,918, which figure does not give effect to the application of that part of the proceeds of the proposed issues representing new capital.

Total mortgage bonds to be outstanding after the proposed financing will amount to $35,100,000, or 61.6 per cent of the above adjusted net tangible property.

Earnings

For the twelve months ended September 30, 1938, after giving effect to the proposed transaction, the applicant's gross income, after provision for depreciation ($447,812) and before provision for Federal income

in each year thereafter from 1960 to 1967, inclusive, amounting to $57,000, except that as to any part in excess of one-half of the required amount in any year, the company may certify to the trustee in lieu of cash or bonds, expenditures made for additional property (as defined) within twelve months immediately preceding such December 1st. The amounts required to be paid under this covenant approximate an annual sinking or improvement fund of 1 per cent of the principal amount of bonds initially issued. Any cash so paid shall be used by the trustee for the purchase or redemption of bonds of series J at a price not in excess of the current redemption price. The mortgage also contains a maintenance provision whereby the company covenants that it shall, in each calendar year, in the aggregate (a) expend for maintenance and repairs, and/or (b) deposit in cash with the trustee on account of maintenance, repairs, renewals, and replacements, and/or (c) allocate to the same purpose in additional property, a total of not less than the sum of 25 per cent of the gross operating revenues from mortgaged traction properties and 15 per cent of the gross operating revenues from other mortgaged properties.

[13] The classification of accounts, prescribed by the Public Utilities Commission of Maine after the establishment of that Commission in 1914, required electric and gas utility companies to include all their fixed capital (intangibles, land, plant, equipment, etc., other than materials, supplies and small tools), as carried on their books at June 30, 1915, in an account entitled "Fixed Capital at June 30, 1915." Of the $10,499,530 in this account, $6,716,015 represented the amount of property on applicant's books as at June 30, 1915, and $3,783,515 represented the amount of property as of June 30, 1915, acquired by the applicant subsequent to that date.

[14] Applicant states that it is impossible to say how much of such excess has been written off, since much of such property acquisitions has never been segregated by primary accounts, and retirements of such property have been credited, in many cases, to primary accounts covering property constructed or acquired subsequent to date of the original acquisitions.

[15] The account was originally entitled "Franchises, Permits, etc.," and originated by a charge of $150,000 for services, contracts, etc., in connection with the organization of the company and its original property acquisitions in 1905. The account was increased in 1910 by charge of $2,000,000 representing principally services rendered in financing and bringing about acquisitions of that year. The cost of such services, etc., were capitalized by the issuance of common stock in payment therefor at $100 per share. The balance of the $2,327,489, transferred to "Fixed Capital at June 30, 1915," represented principally bond discount and expense.

taxes, is shown in the pro forma income statement of the applicant as $3,480,715, which is 2.66 times the annual interest requirements ($1,311,500) of applicant's funded debt.

Authorization of State Commission

The Public Utilities Commission of the state of Maine has expressly authorized the issue and sale of the aforesaid securities by its order dated February 11, 1939.

Conclusion of Law

In view of the foregoing, the Commission concludes that the proposed issue and sale of $4,500,000 principal amount of applicant's first and general mortgage bonds series J 3½ per cent dated December 1, 1938, and due December 1, 1968, and 5,000 share of its no par[16] common stock at the price of $100 per share are solely for the purpose of financing the business of the applicant; that the proposed issuance has been expressly authorized by the specified state Commission; and that the proposed issuance is therefore exempt from the provisions of § 6 (a) of the act.

An appropriate order will issue. The Commission deems it appropriate in the public interest and for the protection of investors and consumers that its order shall be subject to the following conditions:

1. That the issue and sale of such securities shall be effected in accordance with the terms and conditions set forth in, and for the purposes represented by, said amended application; and

2. That within ten days after the issuance of the aforesaid securities the applicant shall file with this Commission a certificate of notification showing that such issue and sale have been effected in accordance with the terms and conditions of, and for the purposes represented by, said amended application; and

3. That this exemption shall immediately terminate without further order of this Commission if the express authorization of the issue and sale of the aforesaid securities by the Public Utilities Commission of the state of Maine shall be revoked or otherwise terminate.

NOTE: See Holding Company Act Release No. 1449 for Commission's order in this matter.

[16] No particular significance is attached to the fact that the stock to be issued is without par value in view of the small amount which will probably be held by the public and the fact that the presently outstanding common stock of the applicant is also without par value.

PENNSYLVANIA SUPERIOR COURT

West Penn Railways Company

v.

Public Utility Commission

(— Pa. Super. Ct. —, 4 A. (2d) 545.)

Service, § 57 — Power of Commission — Abandonment.

1. The Commission is authorized by statute to determine whether the abandonment of a public utility's service, or any part thereof, is necessary or proper for the service, accommodation, convenience, or safety of the public, p. 25.

Franchises, § 2 — Contract obligations — Street railways.

2. Conditions imposed by a municipality upon a street railway company as a prerequisite of entry become contractual obligations, which must be complied with unless stricken down by some proper legislative exercise of the police power, p. 26.

Street railways, § 13 — Street repair — Contracts as affecting duty.

3. A contractual obligation to repair the street will be enforced while a street railway company occupies a street with its tracks, p. 26.

Street railways, § 13 — Contract obligations — Repair of streets — Discontinued service.

4. Franchise and other contractual rights and obligations relating to the repair of streets apply after operation by a street railway company ceases, p. 26.

Service, § 65 — Powers of Commission — Street railways — Abandonment — Street repair.

5. The Commission cannot create, as conditions precedent to a street railway company's discontinuing service on certain streets, any new rights or impose any higher obligations or greater burdens on the railway company than those existing at the time of discontinuance by virtue of its charter, franchises, contracts, or the common law, p. 26.

Street railways, § 7 — Obligations after service abandonment.

6. A street railway having ceased operation and the rendering of service to the public in a municipality, pertinent franchises, ordinances, and contracts between the company and the municipality are determinative of the respective rights and obligations, and they may not be varied or set aside and other rights granted and obligations imposed unless there is legislative power over the subject matter and such power delegated to the Commission, p. 28.

Procedure, § 30 — Findings — Necessity.

7. The power of the Commission to act by way of order requires findings of fact, based on the evidence, necessary to support the order, p. 28.

Commissions, § 11 — Extent of powers.

8. The area of administrative activity is not boundless; the Commission's power is statutory; and the legislative grant of power to act in any particular case must be clear, p. 28.

Highways and streets, § 3 — Jurisdiction of Commission — Safety.

9. The Public Utility Law gives the Commission no clear or specific power to provide for general highway safety, p. 28.

Service, § 65 — Jurisdiction of Commission — Abandonment — Conditions.

10. Powers of the Commission over abandonment of street railway service do not extend to the creation and enforcing of new rights and obligations after abandonment solely on the basis of a declared policy, p. 28.

Service, § 57 — Powers of Commission — Abandonment.

11. The Commission is authorized by statute to attach conditions to abandonment of the tracks and service of a street railway company, but such conditions cannot raise the standard of duty fixed by law, p. 29.

Service, § 57 — Abandonment — Jurisdiction of Commission — Municipal jurisdiction.

12. The conditions which the Commission may impose upon a street railway company upon that company's abandonment of its tracks and service must be reasonable and be supported by the evidence, and they cannot interfere with the constitutional and statutory powers of the municipalities, p. 29.

Service, § 65 — Abandonment — Powers of Commission.

13. The Commission may, in the first instance, properly pass upon the propriety of conditions requiring a street railway company to comply with its franchises, contractual obligations, and legal duty on abandonment of service, p. 29.

Contracts, § 12 — Disapproval by Commission — Grounds.

14. The Commission erred in disapproving a contract between a street railway company and a municipality on grounds that the contract was contrary to public safety where the Commission's order was not supported by any evidence or by any principle of law, p. 29.

[March 3, 1939.]

APPEALS *by street railway company from adverse orders of the Commission in a proceeding for leave to discontinue service; first order set aside in part and otherwise affirmed, and second order reversed. For decision by Commission, see 23 P.U.R.(N.S.) 252.*

Argued before Keller, P. J., and Cunningham, Baldrige, Stadtfeld, Parker, and Rhodes, JJ.

APPEARANCES: Edward O. Tabor and Kenneth M. Bixler, both of Pittsburgh, for appellant; Samuel Graff Miller, Assistant Counsel, and Edward Knuff, Counsel, both of Harrisburg, for appellee.

RHODES, J.: West Penn Railways Company has appealed from two orders of the Pennsylvania Public Utility Commission. By the one order,

No. 55, April Term, 1939, dated March 22, 1938, 23 P.U.R.(N.S.) 252 (modification refused May 9, 1938), the Commission approved the application of appellant for leave to discontinue street railway service and abandon its street railway line on its McKeesport division, located in the city of McKeesport, the township of Versailles, and the borough of Versailles, in Allegheny county, and in the borough of Irwin, and the township of North Huntingdon, in Westmoreland county, subject to seven conditions. By the other order, No. 72, April Term, 1939, dated May 31, 1938, and served on June 6, 1938, the Commission denied approval of a contract between appellant and the city of McKeesport, executed June 16, 1937, in which it was agreed, inter alia, that appellant was to pay the city $40,000; that the city was to join with appellant in the petition to the Commission for the abandonment of service in the McKeesport division of appellant; that appellant was to be released from all obligations to pave, repave, or reset rails; that the abandoned track of appellant was to remain in place on the streets, and become the property of the city; and that appellant was to remove its trolley wires, feeders, and appurtenances and such poles as were not used by other utilities.

The conditions in the order of March 22, 1938, *supra*, are as follows:

"1. That West Penn Railways Company forthwith pay to the city of McKeesport the sum of $40,000.

"2. That West Penn Railways Company leave in place all track in Walnut street in the city of McKeesport, and in all other streets in the city, embraced in the instant application; West Penn Railways Company shall burn off all rail heads and repave the grooves thus created with suitable bituminous material level with adjacent paving; the work to be done under the supervision of the authorized agent of said city.

"3. That West Penn Railways Company remove all rails and accessories, poles, wires, and other facilities, excepting those used by other utilities, from all portions of paved streets, roads, or highways under the jurisdiction of the State Highway Department and the area so disturbed shall be repaved with suitable materials conforming to the existing adjacent paving; this work to be done in accordance with specifications and under the supervision of the State Department of Highways.

"4. That West Penn Railways Company remove all rails and accessories, poles, wires, and other facilities, excepting those used by other utilities, from all portions of paved streets, roads, or highways under the jurisdiction of Allegheny county authorities, and the area so disturbed shall be repaved with suitable materials conforming to the existing abjacent paving; this work to be done in accordance with specifications and under the supervision of the county engineer.

"5. That West Penn Railways Company remove all rails and accessories, poles, wires, and other facilites, excepting those used by other utilities from all portions of paved streets, roads, or highways in the borough of Irwin, and the area so disturbed shall be repaved with suitable materials conforming to the existing adjacent paving; this work to be done

in accordance with specifications and under the supervision of the authorized agent of said borough.

"6. That, upon removal of rails and accessories in open construction when abutting on the highway, the right of way shall be leveled off and placed in a passable condition.

"7. That the approval herein granted shall become effective only upon the beginning of substitute bus service by Penn Transit Company, in accordance with our approval granted concurrently at A. 14172, F. 37."

The certificate of public convenience, dated March 22, 1938, set forth that the Commission "found and determined that the granting of said application is necessary or proper for the service, accommodation, convenience, and safety of the public, and this certificate is issued evidencing its approval of the said application as set forth in said report and order."

There is ample evidence in the record to support the determination of the Commission that the abandonment of appellant's street railway service over the routes specified in its application was necessary and proper.

Appellant's contentions are that the Commission has no authority to fix repaving and rail removal conditions after abandonment, and that the action of the Commission disapproving the contract between appellant and the city of McKeesport was arbitrary and illegal. We shall consider and dispose of both appeals in this opinion.

(1) Abandonment case. The Public Utility Law, Act of May 28, 1937, P. L. 1053, Art. 2, § 202, 66 PS § 1122, provides in part as follows: "Upon approval of the Commission, evidenced by its certificate of public convenience first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful: . . . (d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, right, power, franchise, or privilege. . . ." Article 2, § 203 (a), 66 PS § 1123 (a), of this act also provides: "A certificate of public convenience shall be granted by order of the Commission, only if and when the Commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public; and the Commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable."

[1] It is by virtue of these powers that the Commission contends that it is authorized to impose the conditions in question. It also appears to be the position of the Commission that it has the right and duty to provide for the safety and comfort of the public in general by prescribing conditions requiring the removal of overhead facilities, the removal or alteration of tracks, and the repaving with suitable materials conforming to the existing adjacent paving of the invaded streets or highways in granting approval of appellant's application for abandonment of its service. On behalf of the Commission it is argued that the word "safety" in §§ 203 (a), 66 PS § 1123 (a), 401, 66 PS § 1171, and 413, 66 PS § 1183, of the Public Utility Law refers to the safety of the public generally. In York R. Co. v. Public Utility Commission (1938) 131 Pa. Super. Ct. 126, 131, 24 P.U.R.(N.S.) 401, 405, 198 Atl. 920, 922, a case

dealing with the securities of a public utility company, in an opinion by President Judge Keller, this court said: "The 'public' for whose convenience, accommodation, safety, and protection the act is concerned is the public who use or desire to use the service and facilities of the utility company, or of some other utility company, and who may be affected by the operation of the public utility. It does not refer to the general investing public." Under the provisions of the Public Utility Law above mentioned, the Commission is to determine whether the abandonment of a public utility's service, or any part thereof, is necessary or proper—that is, advantageous—for the service, accommodation, convenience, or safety of the public.

[2–5] Article 17, § 9, of the Constitution of Pennsylvania, PS, provides that: "No street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of its local authorities." Conditions imposed by city, borough, or township upon a street railway company as a prerequisite of entry become contractual obligations, which must be complied with unless stricken down by some proper legislative exercise of the police power. Collingdale v. Philadelphia Rapid Transit Co. 274 Pa. 124, 127, P.U.R. 1922E, 841, 117 Atl. 909; Carlisle v. Public Service Commission (1923) 81 Pa. Super. Ct. 475, 479. While a street railway company occupies a street with its tracks an obligation to repair the street imposed by contract will be enforced. Norristown v. Reading Transit & Light Co. (1923) 277 Pa. 459, 121 Atl. 495. In Reading v. United Traction Co. (1906) 215 Pa. 250, 64 Atl. 446, 7 Ann. Cas. 380, it was held that a street railway company was bound to keep the portions of streets occupied by its right of way in good condition, even in the absence of any express contract or statutory direction to that effect. It also held, p. 255 of 215 Pa. that: "It is because the municipality, as the agent of the state, has charge of the streets, that it must maintain and keep them in proper repair, and when the state permits this charge, as to a portion of a street, to be committed to another, it must be understood as imposing upon such party the responsibility that formerly rested upon the municipality, unless in the grant, or in the municipal consent thereto, of the right to use a portion of the street, such responsibility is expressly withheld and its imposition continued upon the municipality." The state in the exercise of the police power under Art. 16, § 3, of the Constitution may alter agreements evidenced by charters, ordinances, or other contracts, in the interest of the public, made by public service companies, and delegate to the Commission the power to determine the rights of the respective parties, when the facts establish the necessity for so doing (Norristown v. Reading Transit & Light Co. *supra*, p. 466 of 277 Pa.; Scranton v. Public Service Commission, 268 Pa. 192, P.U.R. 1920F, 661, 110 Atl. 775; Fogelsville & T. Electric Co. v. Pennsylvania Power & Light Co. 271 Pa. 237, P.U.R,1921E, 767, 114 Atl. 822); but where, as here, operation by the street railway company ceases, franchise and other contractual rights and obligations apply thereafter. The Commission, for example, may make

inoperative a franchise provision fixing the rates of an operating utility (Scranton v. Public Service Commission, *supra*); this is a proper exercise of its delegated power. See Art. 3 of the Public Utility Law, 66 PS § 1141 et seq. As conditions precedent to appellant's discontinuing service on certain streets and highways, the Commission could not create any new rights or impose any higher obligations or greater burdens on appellant than those existing at the time of discontinuance by virtue of its charter, franchises, contracts, or the common law. The repaving, resurfacing, and rail removal conditions (2, 3, 4, 5, and 6), which the Commission imposed after it had determined the discontinuance of service sought by appellant, and as described in its application, to be necessary in the public interest, are not predicated on appellant's legal obligations, but the conditions were imposed in pursuance of the Commission's policy that "no street railway company shall abandon service unless, and until it shall remove its tracks, poles, wires, and other facilities from the improved portion of the highway, and restore that portion of the highway previously occupied by its track and other facilities, so as to conform with the remaining surface of the roadway," at p. 254 of 23 P.U.R. (N.S.). See Erie Lighting Co. v. Public Utility Commission (1938) 131 Pa. Super. Ct. 190, 24 P.U.R. (N.S.) 45, 198 Atl. 901; Interstate Commerce Commission v. Goodrich Transit Co. (1912) 224 U. S. 194, 214, 56 L. ed. 729, 32 S. Ct. 436, 441.

It is argued on behalf of the Commission that even if performance of the conditions should incidentally require more or less than expressly required by a franchise contract this effect would be irrelevant, since promotion of the public safety is as conducive, if not more conducive, to the general well-being of the commonwealth as the assurance of reasonable rates. Section 920 of the Public Utility Law, 66 PS § 1360, provides for the modification of contracts by order of the Commission, after hearing. If applicable, the Commission has made no attempt to modify any contract involved in the instant case in the manner prescribed in that section.

There is a clear distinction between the modification or reformation of a franchise fixing rates to be charged by an operating utility and varying or setting aside a franchise provision prescribing the duty of a street railway company to a municipality on cessation of operation and abandonment of its lines in that municipality. Rate making, an appropriate exercise of the legislative power, has been delegated to the Commission. The principles governing change by the Commission of rates fixed by franchise, ordinance, or agreement need not be repeated. See Scranton v. Public Service Commission, *supra;* Dormont v. South Pittsburgh Water Co. (1936) 322 Pa. 60, 185 Atl. 263. In Swarthmore v. Public Service Commission, 277 Pa. 472, 479, P.U.R.1923E, 367, 371, 121 Atl. 488, 490, it was held: "Under our decisions to date, contracts made by public service corporations have been held subject to revision only in so far as they deal directly with rates, and agreements of this character have been so held because Art. 5, § 3, of the Public Service Company Law [66 PS § 492] clearly grant that re-

visory power to the Commission. So far as our cases show, contractual obligations of the nature of the one here involved have been treated as though not within the jurisdiction of the Commission, and, accordingly, enforced by the courts (Sayre v. Waverly, Sayre & A. Traction Co. (1921) 270 Pa. 412, 113 Atl. 424; Chambersburg v. Chambersburg & G. Electric R. Co. (1917) 258 Pa. 57, 101 Atl. 922)."

[6] After a street railway company ceases its operation and the rendering of service to the public in a municipality pertinent franchises, ordinances, and contracts between the company and the municipality are determinative of the respective rights and obligations, and they may not be varied or set aside and other rights granted and obligations imposed unless there is legislative power over the subject matter and such power delegated to the Commission. The statute is silent on the subject. See Blue Mountain Consol. Water Co. v. Public Service Commission (1937) 125 Pa. Super. Ct. 1, 8, 17 P.U.R.(N.S.) 128, 189 Atl. 545.

[7–9] In its report and order the Commission states: "To permit these abandoned tracks to remain in place would constitute a hazard not only to the substitute bus operation, which will be over portions or all of such streets, but also would constitute a hazard to all vehicular traffic and would, therefore, endanger the safety of the public." At p. 256 of 23 P.U.R.(N.S.). This is an assumption on the part of the Commission which may or may not be true. The Commission's power to act by way of order requires findings of fact, based on the evidence, necessary to support the order. The area of administrative activity is not boundless; the Commission's power is statutory; and the legislative grant of power to act in any particular case must be clear. Day v. Public Service Commission (1933) 312 Pa. 381, 384, 3 P.U.R.(N.S.) 103, 167 Atl. 565. The Public Utility Law gives the Commission no clear or specific power to provide for general highway safety. This is a matter thus far entrusted to other agencies.

Condition 1 in the order of March 22, 1938, *supra*, requires appellant to pay the city of McKeesport $40,000. The Commission's brief offers no explanation or argument in support of this condition, and we find no justification for its imposition. Condition 2 would deny appellant the benefits intended to result from such payment under the agreement of June 16, 1937, between appellant and the city of McKeesport, and which agreement the Commission has refused to approve. Obviously these conditions produce an anomalous situation. No objection is raised to condition 7 which provides that the approval of the application for abandonment shall become effective only upon the beginning of substituted bus service by Penn Transit Company.

[10] If the abandonment of a portion of appellant's line is necessary or proper for the service, accommodation, convenience, or safety of the public, as determined by the Commission, the respective rights and obligations which exist or arise by law or contract upon the discontinuance of such service are enforceable by judicial process. We recognize the broad power of the Commission in the supervising and regulating of utilities, which includes

the Commission's control of the abandonment of any service, right, power, franchise, or privilege of any public utility; but such power does not extend to the creation and enforcing of new rights and obligations after abandonment solely on the basis of a declared policy.

[11, 12] The Commission may, under § 203 (a), 66 PS § 1123 (a), of the Public Utility Law, attach conditions to abandonment of the tracks and service of a street railway company, but such conditions cannot raise the standard of duty fixed by law. The conditions which may be imposed must be reasonable and be supported by the evidence, and they cannot interfere with the constitutional and statutory powers of the municipalities. See Act of June 23, 1931, P. L. 932, Art. 29, §§ 2915, 2930, 53 PS §§ 12198–2915, 12198–2930; Setzer v. Pottsville (1919) 73 Pa. Super. Ct. 573; Commonwealth v. Kennedy (1937) 129 Pa. Super. Ct. 149, 163, 195 Atl. 770.

[13] Conditions 1, 2, 3, 4, 5, and 6 cannot be sustained in their present form. Although appellant presented testimony that upon abandonment it would remove all trolley wires, feeders, signals, and telephones, and such poles as were not used generally by other utilities or for fire alarm systems, at its own cost and expense, they contain matters based only on the Commission's policy and having no evidential support in the record. It refused to recognize appellant's contention that its repaving obligations depended upon franchises, obligations growing out of rights of way in fee, and various agreements with the municipalities. As to the first, second, third, fourth, fifth, and sixth conditions the order of the Commission of March 22, 1938, *supra,* is set aside. Otherwise, the order is affirmed, subject to the imposition of conditions by the Commission, after hearing, requiring appellant, outside of the city of McKeesport, to comply with its franchises and contractual obligations and legal duty on abandonment. For such purpose the record is remitted. The Commission may properly pass upon these matters in connection with abandonment in the first instance. See St. Clair v. Tamaqua & P. Electric R. Co. 259 Pa. 462, P.U.R.1918D, 229, 103 Atl. 287, 5 A.L.R. 20; Pittsburgh R. Co. v. Public Service Commission (1934) 115 Pa. Super. Ct. 58, 6 P.U.R.(N.S.) 369, 174 Atl. 670.

[14] (2) Contract case. The Commission in its brief has stated that should this court find "that the Commission erred in imposing conditions precedent to abandonment, then the Commission has also erred in disapproving the contract."

Approval of the contract was sought by appellant as provided by § 911 of the Public Utility Law of May 28, 1937, P. L. 1053, Art. 9, 66 PS § 1351. The contract recited that under various franchise ordinances certain paving obligations had been incurred by appellant, and were still existing. In consideration of the payment of $40,000 by appellant and the leaving of its tracks in place to become the property of the city, over which service was to be discontinued, the city agreed to relinquish all claims against appellant by reason of the provisions for paving or repaving or resetting of rails under said franchise ordinances. The rec-

ord before the Commission consisted of the contract and appellant's application for approval. The order of the Commission refusing to approve the contract is, like conditions in the order of March 22, 1938, *supra,* as to abandonment, based on the declared policy of the Commission. See § 1005, Art. 10, of the Public Utility Law, 66 PS § 1395; Pennsylvania Power & Light Co. v. Public Service Commission (1937) 128 Pa. Super. Ct. 195, 218, 19 P.U.R.(N.S.) 433, 193 Atl. 427. In the Commission's brief it is said: "No hearing was necessary in connection with the contract here involved, since its provisions were clearly contrary to the requirements found necessary by the Commission in the interest of public safety." However, the Commission's order is not supported by any evidence or by any principle of law. See Erie Lighting Co. v. Public Utility Commission (1938) 131 Pa. Super. Ct. 190, 24 P.U.R.(N.S.) 45, 198 Atl. 901; Morgan v. United States (1938) 304 U. S. 1, 82 L. ed. 1129, 23 P.U.R.(N.S.) 339, 346, 58 S. Ct. 773, 999; Pennsylvania R. Co. v. Public Service Commission (1917) 69 Pa. Super. Ct. 404. Section 1910, Art. 19, of the Act of June 23, 1931, P. L. 932, 53 PS § 12198–1910, authorizes any city of the third class (city of McKeesport) to enter into an agreement with a street railway company "affecting, fixing, and regulating the franchises, powers, duties, and liabilities of such companies, and the regulations and respective rights of the contracting parties," and to "provide for payments by the companies to the city in lieu of the performance of certain duties or the payment of license fees or charges imposed in favor of such city, by the charters of the respective companies, or by any general law or ordinance. . . ." Such contracts, however, are "subject to the provisions of the Public Service Company Law." The contract between appellant and the city of McKeesport was legal and was within the power of the city to make, subject to the Commission's approval. The Commission cannot arbitrarily refuse approval of it. The Commission's orders would result in appellant's paying the consideration in the contract to the city of McKeesport without receiving the benefits of the contract. The Commission's contention that this contract on its face was inconsistent with the safety of the public generally is without merit.

The order of the Commission is reversed, and the record is remitted to the Commission with direction to approve the contract. Cost of the appeal (No. 72, April Term, 1939) shall be paid by the Pennsylvania Public Utility Commission.

CALIFORNIA SUPREME COURT

Paul Entremont et al.

v.

Leon O. Whitsell et al.

[S. F. 15772.]

(— Cal. (2d) —, 89 P. (2d) 392.)

Public utilities, § 90 — Common carriage for hire — Contract with state department.

1. A contract between a truck owner and the Department of Public Works whereby the former is to furnish, at an hourly rate, trucks, drivers, and fuel, make necessary repairs, carry compensation insurance, and assume all liability for damage to other property or injury to persons caused by the operation of the equipment, constitutes a contract for the transportation of property over the public highways within the meaning of the Highway Carriers' Act, and, therefore, subject to the jurisdiction of the Commission, as against the contention that it constitutes a renting of trucks within the meaning of the Streets and Highways Code, p. 33.

Public utilities, § 34 — Motor carrier status — Rental or service performance.

2. The cases dealing with the doctrine of respondeat superior rather than the cases dealing with compensation under the Workmen's Compensation Act state the proper rule in ascertaining whether a contract calls for a rental of equipment or for services to be performed, as affecting status of a motor truck owner contracting with the Department of Public Works, p. 33.

Contracts, § 14 — Interpretation of ambiguous contracts.

3. The interpretation rendering a contract valid should be preferred over that rendering it invalid where two interpretations are possible, p. 33.

Public utilities, § 48 — Use of public highways — Transportation for road building.

4. Transportation over the public highways of materials to be used by the state in road building constitutes transportation upon a public highway within the meaning of the motor carrier regulatory statutes, although the building of a highway by a governmental agency is not a commercial purpose, p. 36.

Motor carriers, § 11 — Jurisdiction of Commission — Regulation of truckers or state agencies.

5. That a motor trucker is engaged in transportation for the state does not mean that the Commission, in assuming jurisdiction over the operations of such carrier, is regulating a state agency, p. 38.

Discrimination, § 88 — Preferences to state — Validity of contracts.

6. That the Public Utilities Act authorizes motor carriers to give rate preferences to the state, and is not violative of the Highway Carriers' Act, does not mean that every contract for a reduced rate is thereby rendered valid, p. 38.

Rates, § 3 — Constitutionality of statute — Powers of Commission — Regulation of private carriers.

7. The Highway Carriers' Act, authorizing the Commission to regulate rates of private carriers, is constitutional as against the contention that regulation of the rates of private carriers is not cognate and germane to the regulation of common carriers, p. 40.

(EDMONDS, J., dissents; HOUSER, J., concurs in conclusion.)

[April 17, 1939.]

EN BANC. ORIGINAL *proceeding in certiorari to secure an annulment of an order of the Commission requiring carrier to collect amount of undercharges and to abstain from charging less than the rate fixed by the Commission; order affirmed. For earlier opinions, see 27 P.U.R.(N.S.) 492, 80 P. (2d) 987, and 20 P.U.R.(N.S.) 520, 68 P. (2d) 964.*

APPEARANCES: Albert E. Sheets, of Sacramento, for petitioner Paul Entremont; C. C. Carleton, C. R. Montgomery, Robert E. Reed, and Frank B. Durkee, all of Sacramento (P. N. McCloskey, of Los Angeles, of Counsel), for petitioner Department of Public Works of State of California; P. N. McCloskey, Ray L. Chesebro, City Attorney, Frederick von Schrader, Assistant City Attorney, and Bourke Jones, Deputy City Attorney, all of Los Angeles, amici curiae; Carl R. Schulz, of San Francisco, amicus curiæ for California Hay, Grain and Feed Dealers' Association; Ira H. Rowell, Frank B. Austin, Scott Elder, and Mary J. Moran, all of San Francisco, for respondents; Edward M. Berol, of San Francisco, Wallace K. Downey and H. J. Bischoff, both of Los Angeles, and Sanborn, Roehl & MacLeod, Douglas Brookman, Hugh Gordon, Reginald L. Vaughan, and Varnum Paul, all of San Francisco, Robert Brennan, of Los Angeles, Gerald E. Duffy, of San Francisco, Frank Karr and E. E. Bennett, both of Los Angeles, C. W. Dooling, L. N. Bradshaw, McCutchen, Olney Mannon & Greene, Guy V. Shoup, and C. O. Amonette, all of San Francisco, and R. E. Wedekind, of Los Angeles, amici curiæ.

PER CURIAM: This is an original proceeding in certiorari instituted by petitioners Entremont and the State Department of Public Works against the Railroad Commission to secure an annulment of an order of the respondent Commission. In the order sought to be annulled it was found that Entremont, as a private carrier, and subject to regulation by the Commission, had charged the Department of Public Works less than the minimum rates fixed for such service by the Commission, and Entremont was ordered to collect from the department the amount of such undercharge and to abstain from charging less than the rate fixed for such service by the Commission.

There is practically no dispute as to the facts. So far as pertinent here they are as follows:

In 1935 the legislature passed the

Highway Carriers' Act, Stats. 1935, Chap. 223, p. 878; Deering's 1935 Supp., Act 5129a, p. 1358, conferring upon the Commission, with certain exceptions, the power to fix the rates to be charged by highway carriers, as distinguished from common carriers. Acting pursuant to the power thus conferred, the Commission fixed the minimum rate for the transportation of sand, rock, gravel, excavated material, and road building material in automobile dump trucks of 3½ cubic yards capacity, at $2.59 per hour. After this order was made, Entremont, who then held a permit as a radial highway common carrier, on February 11, 1936, as the lowest responsible bidder, entered into a contract with the Department of Public Works, Division of Highways, whereby he agreed to "rent" three dump trucks of the above-described property with drivers, to the department, the trucks to be used as needed for the transportation of road building or excavated material in the repair of highways. This contract fixed a "rental" price of $2.50 per hour for the use of such trucks and drivers. After entering into this contract the three trucks were used by the department pursuant to the agreement for 251 hours. According to the rate fixed by the contract, less a discount of ½ per cent for cash, the return to Entremont was $25.72 less than he would have received had he charged the minimum rate of $2.59 per hour fixed by the Commission for such service.

Upon its own motion, the Commission instituted an investigation into the charges Entremont was making for the use of his dump trucks under the contract. In this proceeding the department intervened on behalf of Entremont. Several truck associations likewise intervened. As a result of this investigation, and after a full hearing, the Commission determined that the contract between Entremont and the Department of Public Works called for the transportation of materials on the highway within the meaning of the order of the Commission fixing the minimum rates for such service. It thereupon made and entered its order here sought to be annulled.

The petitioners make two main contentions:

First, assuming the constitutionality of the Highway Carriers' Act, *supra*, it is contended that the transactions here involved were not within the purview of that act; and second, that if the transactions were within the act, the statute is unconstitutional.

In connection with the first contention, the main arguments of petitioners are that the transaction is controlled not by the Highway Carriers' Act, but by §§ 136 and 136.5 of the Streets and Highways Code, Stats. 1935, Chap. 29, pp. 248, 262; that the trucks were contributing to the maintenance of the highways, and, therefore, were not being operated over the public highways within the meaning of the Highway Carriers' Act; and that the act, in any event, does not apply to hauling performed by the state. In our opinion, none of these arguments is sound.

[1–3] The first argument is predicated upon the premise that the contract between Entremont and the department did not constitute the transportation of property for compensation over the public highways, but was

in fact the leasing or renting of trucks within the meaning of §§ 136 and 136.5 of the Streets and Highways Code. These sections require competitive bidding for the "leasing or renting of tools or equipment for state highway purposes" by the department. It must be conceded that if Entremont had rented or leased his trucks to the department, and, if then the department had operated these trucks, clearly the transaction would not be subject to the rate regulations of the Commission. In that event the transaction would be governed by the sections of the Streets and Highways Code. On the other hand, if Entremont, under the contract, operated the trucks, and transported the property of the state over the public highways for compensation or hire as a business, then the Highway Carriers' Act is applicable and the Streets and Highways Code provisions have no application.

It is our opinion that the contract, denominated by the parties as a "Service Agreement," was for the transportation of property by motor vehicle, and was not for the renting or leasing of tools or equipment. The contract provides that Entremont, "hereinafter called the vendor, hereby agrees to furnish the services or rental . . . to the Department of Public Works . . . and agrees to receive and accept as full compensation therefor the prices named in the following memorandum:

"For the rental of three only three and one-half yard dump trucks for 500 hours each at $2.50 each per hour, including operation.

"The trucks are to be used principally under power shovels for hauling gravel, slide material, etc., and for other miscellaneous hauling jobs as required anywhere in District 1."

After designating the specifications of the trucks, the agreement contains certain "special provisions." It is therein provided, among other things, that "the equipment is to be operated by the vendor, and the vendor is to furnish competent operators, all operating supplies such as gasoline, oils, etc., and all repairs necessary to keep the equipment in efficient running order"; that "the equipment will only be used as required . . ."; that the trucks must be kept within District 1 ready for immediate call; that "the operators furnished under this service agreement are to perform their duties to the satisfaction of the Department of Public Works, and the vendor is to replace them at any time that they do not prove satisfactory, at his own expense." The agreement required Entremont to carry compensation insurance and to assume all liability for damage to other property or injury to persons caused by the operation of the equipment. It also was provided that "all persons engaged on this work are employees of the vendor and none are employees of the Department of Public Works."

Although the solution of the problem is not entirely free from doubt, it is our opinion that this contract did not constitute the renting or leasing of equipment to the department but was a contract calling for the transportation of property by motor vehicle by Entremont. This conclusion follows from the fact that under the contract the possession and control of the trucks and the operators thereof did not pass to the department—the operators did not become the employees of

the department—but such possession and control remained in Entremont. The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property. Civ. Code, §§ 1925, 1955. The record is clear that the only supervision exercised by the department over the operators of the trucks was to direct them where to load and unload the material hauled, when to go on or leave the job, and to inform the operators whether the load should be dumped or spread. The department had no power to discharge the drivers—that power, and the power of selection, rested in Entremont. That is a factor of some importance in ascertaining whether Entremont or the department controlled the operators. Lowell v. Harris (1937) 24 Cal. App. (2d) 70, 74 P. (2d) 551. Moreover, the provisions of the contract indicate that it was not the intention of the parties that the department should exercise exclusive control over the operators. The contract required Entremont to keep the trucks in repair; to pay all expenses incidental thereto; to supply all oil, gas, and other materials necessary for their operation; to carry compensation insurance on the drivers, and expressly provided the operators were the employees of Entremont. Further, under the contract, Entremont assumed all responsibility for damage or injury to other persons or property by reason of the operation of the trucks. This provision strongly implies that exclusive control was not conferred on the department.

The general rules applicable to this situation have been correctly stated in many cases. The applicable rule is stated in 39 C. J. § 1462, p. 1274, as follows: "A servant of one employer does not become the servant of another for whom the work is performed merely because the latter points out the work to the servant, or gives him signals calling the service into activity, or gives him directions as to the details of the work and the manner of doing it." This rule has been adopted by many cases in this state. Billig v. Southern P. Co. (1922) 189 Cal. 477, 209 Pac. 241; Stewart v. California Improv. Co. (1900) 131 Cal. 125, 63 Pac. 177, 724, 52 L.R.A. 205; Lowell v. Harris, *supra;* see, also, Wagner v. Larsen (1921) 174 Wis. 26, 182 N. W. 336; Shepard v. Jacobs (1910) 204 Mass. 110, 90 N. E. 392, 26 L.R.A.(N.S.) 442, 134 Am. St. Rep. 648; Morris v. Trudo (1909) 83 Vt. 44, 74 Atl. 387, 25 L.R.A.(N.S.) 33; Cook v. Wright (1937) 177 Miss. 644, 171 So. 686.

We think the rule of these cases rather than the doctrine stated in Department of Water and Power v. Industrial Accident Commission (1934) 220 Cal. 638, 32 P. (2d) 354, and Independence Indemnity Co. v. Industrial Accident Commission (1928) 203 Cal. 51, 262 Pac. 757, cases relied upon by petitioners, is applicable here. These last two cases recognized that where the special employer exercises some measure of control comparable to the control here involved, an injured employee under the Workmen's Compensation Act can secure an award against both his special and general employer. We think that in ascertaining whether the contract called for a rental of equipment or for services to be performed by Entremont, the cases above cited dealing with the doc-

trine of respondeat superior rather than the cases dealing with compensation under the Workmen's Compensation Act state the proper rule. This is so because the problem is who operated the trucks, and who was responsible for their operation, and not as to the liability to special employees under the Workmen's Compensation Act.

The case of People v. Tedesco (1937) 18 Cal. App. (2d) 667, 64 P. (2d) 966, cited by petitioners, is not helpful on this issue. That decision was on demurrer, and the actual facts of the operation do not appear.

There are two other factors which are of some importance, although neither is conclusive, on this phase of the problem. If it should be held that under the contract the equipment, with operators, was rented to the department, and that the department was, therefore, in exclusive control of the operators, then the operators would be employees of the state, and, it would probably follow, that the contract would be illegal and void under the provisions of Art. 24 of the state Constitution, and of the Civil Service Act, Deering's Gen. Laws, 1937, Act 1401, p. 740, as these provisions have been interpreted in State Compensation Insurance Fund v. Riley (1937) 9 Cal. (2d) 126, 69 P. (2d) 985, and Stockburger v. Riley (1937) 21 Cal. App. (2d) 165, 68 P. (2d) 741. Where two interpretations are possible, one rendering the contract valid and the other rendering it illegal, the former, under elementary principles, is to be preferred.

Secondly, it should be mentioned that petitioner Entremont apparently conceived the transaction to be one whereby he was engaged in the transportation of property by motor vehicles upon the highways, instead of a renting contract, because in his return filed with the state board of equalization pursuant to the Motor Vehicle License Tax Act, Stats. 1933, Chap. 339, p. 928, he included the income paid to him by the department as part of his gross receipts. That act, so far as pertinent here, would not be applicable if the transaction involved a rental.

From all these circumstances it must be held that the transaction lacks that element of a transfer of use and possession of property to the hirer which is essential to the existence of a leasing, Holmes v. Railroad Commission (1925) 197 Cal. 627, P.U.R. 1926C, 664, 242 Pac. 486; Reavley v. State (1933) 124 Tex. Crim. Rep. 528, 2 P.U.R.(N.S.) 90, 63 S. W. (2d) 709; that the provisions of the Streets and Highways Code have no application; and that the operation called for by the contract was the transportation of property for compensation over the public highway as a business within the meaning of the Highway Carriers' Act.

[4] Petitioners' next contention is that the transportation involved herein was for the purpose of maintaining a public highway, and did not constitute transportation upon a public highway within the meaning of the act. The contract itself described the operation as "hauling gravel, slide material, etc., and for other miscellaneous hauling jobs as required anywhere in District 1." The evidence shows that the department needed these trucks, in addition to trucks owned and operated by it, as emergency equipment to assist

it in keeping the public highways in District 1 in proper repair. Although District 1 includes Del Norte, Humboldt, Mendocino and Lake counties, and part of Trinity and Siskiyou counties, the evidence shows that the actual operations of Entremont under the contract were limited to an 11-mile strip of the state highway between the Sonoma-Mendocino county line and the town of Hopland. The trucks were used either to transport gravel from the gravel pits to the point where the gravel was used for the purpose of filling washed out portions of the road, or to transport excavated material from where excavated to the point of disposal. A major portion of each movement of the trucks was the transportation of these materials over the public highway, which highway was then open to public travel. The hauls varied in length from eleven miles to a few hundred feet. As far as Entremont is concerned, he being the person, as already held, who was performing the operation, clearly the above-described activities constitute the transportation of property for commercial purposes for a compensation over the public highways within the meaning of the Highway Carriers' Act. So far as Entremont is concerned, he was transporting the material to be used in repair of a highway over the highway. He was engaged in a commercial enterprise. He was employed to transport road building or waste material from one point on the highway to another. So far as he was concerned, that was a carriage of property for a commercial purpose. If the trucks had, in fact, been operated by the department, then petitioners' contentions would be sound. Clearly, the building of a highway or bridge by a governmental agency is not a "commercial" purpose (New York ex rel. Rogers v. Graves (1937) 299 U. S. 401, 81 L. ed. 306, 57 S. Ct. 269), but that doctrine has no application to the activities of a trucker who is employed to transport some of the materials to be so used over the highways.

There is nothing in Oswald v. Johnson (1930) 210 Cal. 321, 291 Pac. 579, heavily relied upon by petitioners, contrary to these views. That case involved the question as to whether certain contractors were liable for the gasoline tax imposed on fuel used in vehicles operated on the public highways. It was held that gasoline used in rollers and tractors used in the construction of a highway then not open to the public was not taxable. The court stated, 210 Cal. at p. 322:

"The Gasoline Tax Act was intended to provide for a license tax on motor vehicle fuel used on public highways of the state available for public travel and in aid of the construction, maintenance, and repair of public highways. Obviously, it was not intended to require a license tax on motor fuel used exclusively on the right of way under construction.

"When, as here, the rollers and tractors are being used in such construction, the public highway is not being 'operated upon' in the sense intended by the statute. Practically this same question was presented to the supreme court of South Dakota in Allen v. Jones (1924) 47 S. D. 603, 201 N. W. 353, where it was held that a traction engine while in use in the construction of a highway is not 'operated upon a highway' as contemplated by a Gasoline License Tax Act of that state,

similar in effect to our own statute with regard to exemptions. *It is pertinently observed in that case, however, that motor fuel used in propelling tractors or trucks in the transportation of road building material or motor fuel to or from the site of construction is used in 'operation upon' the highways* and is not purchased subject to the refund."

[5, 6] The problem involved in the instant case is very similar to the situation discussed in the italicized portion of the above quotation. The next contention of petitioners is that, assuming the contract called for the transportation of property for a commercial purpose by Entremont over the public highways, and therefore was superficially within the terms of the Highway Carriers' Act, the statute should be so construed as to render the transaction here involved as not within the statute. The reasons advanced are, first, that the state is not bound by its statutes unless expressly mentioned; and second, that the Public Utilities Act, Deering's Gen. Laws Act 6386, and the Civil Code indicate a legislative policy or intent to exempt transportation for the state from regulation, and to favor preferential charges to the state.

On this phase of the litigation we are satisfied with that portion of the first opinion prepared herein by Justice Langdon dealing with these two issues (20 P.U.R.[N.S.] 520, 68 P. (2d) 964, 966). We therefore adopt as our conclusions thereon the following portions of that opinion:

"The first reason is obviously based upon an unsound assumption. The Department of Public Works was in this case only a shipper, with materials to be moved. Entremont was the carrier. The statute does not cover shippers, but carriers, and the Commission's regulation was directed toward the carrier, and not toward the state. Accordingly, the mere fact that Entremont was engaged in transportation for the state does not mean that the Commission was regulating a state agency.

"The second reason requires fuller consideration. Section 17(a) (4) of the Public Utilities Act (Deering's Gen. Laws, Supp. 1935, Act 6386) provides that common carriers may transport persons or property 'free or at reduced rates' for the United States, state, county, or municipal governments, where such free or reduced rate transportation is provided for in the contract. Section 17.5 of the act (Supp. 1935) makes the same provision where transportation is for contractors carrying out contracts with the United States, state, or other governmental agency in this state. Section 2171 of the Civil Code provides: 'A common carrier must always give a preference in time, and may give a preference in price, to the United States and to this state.' These provisions permit preferential rates to governmental agencies such as the Department of Public Works, and there is nothing in the Highway Carriers' Act which attempts to prohibit such preferences. This has been recognized by the Commission in a number of instances in which reduced rates to the state or subdivisions have been approved.

"But though it is conceded that preferences to governmental agencies are authorized by the Public Utilities Act and not prohibited by the High-

way Carriers' Act, it does not follow that any and every contract for a reduced rate is thereby rendered valid. The declaration of policy is not an absolute guaranty of preferences, and it does not determine questions of procedure. In this connection, an important section of the Highway Carriers' Act must be read. Section 11 of said act (Gen. Laws Supp. 1935, Act 5129a) provides: 'If any highway carrier other than a common carrier desires to perform any transportation or accessorial service at a lesser rate than the minimum rates so established, the Railroad Commission shall, upon finding that the proposed rate is reasonable authorize such rates less than the minimum rates established in accordance with the provisions of § 10 hereof.' This section recognizes the possibility of valid preferential rates, and thereby supports and does not conflict with the declared policy in the above-quoted provisions of the Public Utilities Act. But it adds a requirement for highway carriers which is not made in the case of common carriers, namely, a prior application to the Commission for authority to establish the rate; and it gives the Commission power to reject the proposed preference, if it appears to create an unjust or unreasonable discrimination against the public interest.

"In our opinion this section is clearly applicable to transactions with governmental agencies, and there is no reason for construing it otherwise. If it were not applied, preferences to such agencies would be entirely uncontrolled, with the consequent evils of unwarranted discrimination and price cutting by irresponsible carriers. The Commission was given authority to approve reasonable preferences, and its authority must be upheld. Competitive bidding is not prevented; it is still possible to the fullest extent, subject to the Commission's approval of the final bid, before the rate goes into effect. An instructive discussion of a similar authority of the Interstate Commerce Commission will be found in United States v. Tennessee (1923) 262 U. S. 318, 67 L. ed. 999, 43 S. Ct. 583. See, also, Hillsboro v. Public Service Commission, 97 Or. 320, P.U.R.1920C, 817, 187 Pac. 617, 192 Pac. 390, where the court held that service to municipalities was within the regulatory powers of the Commission.

"It is to be noted, also, that the requirement of prior application to the Commission follows logically from the nature of the regulatory provisions of the Highway Carriers' Act. Under the Public Utilities Act, carriers subject thereto establish their own rates by filing tariffs with the Commission, subject to the power of the Commission to change them for good cause. Doubtless such carriers, under the provisions of the act dealing with preferences, may themselves contract for preferential rates to governmental agencies, and the rates thus made will apply, subject to any later action by the Commission. Under the Highway Carriers' Act, perhaps because of the prior experience with large numbers of truckers who engaged in bitter competition at ruinously low rates, a system was established whereby the Commission itself fixes the original rates and approves all changes, before they go into effect. There is no logical reason why this prior approval should not be secured before any preferential rate

is given. It is to be assumed that the Commission will act in accordance with the statutory declaration of policy in favor of preferences to the state, and, under § 11 of the Highway Carriers' Act, will approve any requested preference unless the evidence shows that the particular preferential rate will constitute an unjust or unreasonable discrimination, and that the public interest will suffer thereby. The present proceeding, of course, does not involve any issue of abuse of discretion in the disapproval of a preferential rate."

[7] Both petitioners, and numerous amici curiæ, have filed exhaustive briefs on the question of the constitutionality of the Highway Carriers' Act. It is urged that the regulation of the rates of private carriers is not cognate and germane to the regulation of common carriers, and that therefore the legislature was powerless to confer such power on the Railroad Commission. Substantially, the same arguments were advanced in challenging the constitutionality of the City Carriers' Act, Stats. 1935, Chap. 312, p. 1057, as amended in 1937, Stats. 1937, Chap. 286, p. 629. In Morel v. Railroad Commission (1938) 11 Cal. (2d) 488, 81 P. (2d) 144, all of these arguments were held to be unsound. No good reason exists for repeating the conclusions therein reached. Upon the authority of the Morel Case it is concluded that the statute is constitutional.

For the reasons stated, we are of the opinion that the order of the respondent Railroad Commission, should be, and it is, hereby affirmed.

EDMONDS, J., dissenting: As I read the contract which is the basis of the controversy between the parties in this case, it provides for the rental of equipment and not for the transportation of property. If this is the correct construction of the instrument, then the petitioner is not subject to the Commission's rate-fixing power, for the relationship created by this contract is primarily determinative of the question for decision.

The contract did not, as the Commission found, call for the use of Entremont's trucks for 500 hours each. The Department of Public Works was not bound to use his trucks for any length of time, for it expressly reserved the right to terminate the agreement *"at any time* . . . when the equipment is no longer needed" or "when state-owned equipment is available." The contract, therefore, was not one for a specific transportation service, but was merely to make extra equipment available for emergency service or whenever state-owned trucks were not available.

Several other factors strongly indicate that this contract was a rental agreement. The rate of compensation was measured solely by the period of time during which the trucks were used and did not depend upon the use to which the trucks were put during that period. Although Entremont undoubtedly had the right to employ truck drivers of his own choosing, he was bound to replace any one who was unsatisfactory to the department. However, with respect to the direction of trucking operations during the performance of the work under the agreement, the evidence unequivocally shows that Entremont neither possessed nor attempted to exercise any

right of control; the operators took orders solely from the foreman in charge of the highway maintenance crew.

Use and control of the hired property is the chief characteristic of a rental agreement. Civil Code, §§ 1925, 1955. To say, as the Commission found, that the trucks were subject to Entremont's control throughout the performance of the hauling and that the directions given to the operators by the foreman "were only such as a carrier would normally have received from one for whom he is transporting property" is in plain contradiction with the facts established at the hearing. The evidence introduced before the Commission shows that the trucks were used in conjunction with those of the Department of Public Works for the purpose of clearing slides and filling washouts on the state highways during the winter season. In doing this work material was carried for distances varying from a few hundred feet to as much as 11 miles, depending upon the necessities of the occasion, and the operators of Entremont's trucks took orders solely from the foreman in charge of the highway maintenance crew, who gave them instructions where to load and unload. In short, during the time the Department of Public Works used the petitioner's equipment, they were a part of the fleet of trucks engaged in the repair work then being done, and no distinction was made between a privately owned unit and one belonging to the state.

It is true that that contract required Entremont to keep the trucks in repair and to pay for all supplies necessary for their operation and that it characterizes the operators as the employees of Entremont. However, it is common business practice to lease construction machinery "including operation," and such facts are in no way inconsistent with the theory of lease. In Stewart v. California Improv. Co. (1900) 131 Cal. 125, 63 Pac. 177, 179, 724, 52 L.R.A. 205, the city of Oakland "hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day" and the court held that the "relation of master and servant existed between said defendant company and the defendant Conger, and not between the city of Oakland and defendant Conger." See, also, Billig v. Southern P. Co. (1922) 189 Cal. 477, 209 Pac. 241; Lowell v. Harris (1937) 24 Cal. App. (2d) 70, 74 P. (2d) 551. Nor is the fact that under the contract Entremont assumed liability for damage or injury to other property or persons inconsistent with a lease. It was competent for the parties to agree inter se upon the incidence of delictual responsibility and no doubt such a contract would be binding as between themselves.

Cases such as Department of Water and Power v. Industrial Accident Commission (1934) 220 Cal. 638, 32 P. (2d) 354, and Independence Indemnity Co. v. Industrial Accident Commission (1928) 203 Cal. 51, 262 Pac. 757, indicating that the department would be a "special employee" under the terms of the Workmen's Compensation Act, are not in point. The term "special employee" is a statutory relationship created by that act and is sui generis.

The case of People v. Tedesco (1937) 18 Cal. App. (2d) 667, 64 P. (2d) 966, lends full support to the conclusion that Entremont was not engaged in the transportation of property upon the highways within the meaning of the Highway Carriers' Act. That case arose upon the sustaining of a demurrer to complaints brought by the state to recover penalties under the Highway Carriers' Act. The complaints alleged that the defendants had engaged in the transportation of property by motor vehicles for compensation in violation of the lawfully established rates for such service. By other allegations of the complaint it appeared that the defendants had hired out trucks of a specified capacity "with operators" to the United States government. The court held that the complaints failed to show that the defendants were "highway carriers."

Holmes v. Railroad Commission (1925) 197 Cal. 627, P.U.R.1926C, 664, 667, 242 Pac. 486, 487, is not contrary to a conclusion that the Entremont contract is a rental agreement. In that case the facts show "leases" between the parties which were a mere subterfuge, because it was apparent on the face of the contracts that the rate payable to the truck owners was based upon the weight of the goods carried and not upon the period of time during which the truck was used. While the "rental" of each truck purported to be $19.50 per day, the court pointed out that "It is apparent from the other provisions of these 'leases,' and from the manner in which they were performed by the parties, that they are nothing more than contracts for the transportation of merchandise for compensation at the rate of 32½ cents per 100 pounds, subject to a minimum charge of 65 cents per shipment." On the other hand, the rate of compensation payable to Entremont under his contract with the department was based solely upon the element of time of use and was in no way dependent upon the weight of the materials carried. The contract did not define either the time involved for performance or the route or termini the trucks were to follow. In my judgment, a consideration of all of these elements, together with the fact that the direction and control of the operators during performance was vested in the department, compels the conclusion that the contract was a lease.

I am, therefore, of the opinion that the order of the Railroad Commission should be annulled.

Houser, J.: I concur in the conclusion.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Clark Baughman et al.

v.

Westmoreland Water Company et al.

[Complaint Docket No. 12586.]

Commissions, § 28 — Jurisdiction — Public officers.

1. The Commission has no jurisdiction to adjudicate differences between township supervisors and the inhabitants of a township as to the dereliction in their duties as supervisors, p. 44.

Service, § 51 — Jurisdiction of Commission — Delinquency of town officials — Extensions.

2. The Commission has no jurisdiction over a complaint that town officials have failed to enter into a contract with a water company to secure an extension of water facilities, p. 44.

Service, § 177 — Extensions — Reasonableness.

3. Each extension of service must be reasonable when viewed in light of the circumstances surrounding it, not only with respect to the needs and requirements of the prospective consumers, but also with respect to any added burden that may be placed upon the utility as a whole if such utility is ordered to extend its facilities, p. 44.

Service, § 210 — Extensions — Prospective revenue — Water utility.

4. A water utility should not be required to construct additional facilities and to render service in a new area for domestic service only, when a return of only 1.81 per cent on capital invested would be earned, but a service extension may be required if sufficient applications for domestic service and for public fire protection are forthcoming to produce a return of 2.68 per cent when 3.41 per cent is acceptable to the company, p. 46.

[May 8, 1939.]

COMPLAINT *against failure of water utility to extend its distribution system and against failure of public officials to enter into contracts to secure service; complaint dismissed as to public officials and service ordered upon conditions.*

By the COMMISSION: This complaint was instituted by the citizens and property owners of Lincoln Heights, Hempfield township, Westmoreland county, and certain citizens and property owners of the city of Jeannette, alleging that Westmoreland Water Company has failed to extend its water distribution system, facilities, and service to complainants' houses, and also alleging that the supervisors of Hempfield township

have failed to enter into a contract with the said water company to secure this service.

[1, 2] Concerning that part of the complaint against the supervisors of Hempfield township, the supervisors aver that the complaint is insufficient to show a breach of any duty which may be imposed on them by any law of this commonwealth, and further that the Commission is without jurisdiction to make any order against the supervisors of Hempfield township, by reason of the facts described in the complaint. The latter point is well taken. The Commission has no jurisdiction to adjudicate differences between township supervisors and the inhabitants of a township, as to the dereliction in their duties qua supervisors. For this reason, there is no occasion to pass on complainants' charge against the respondents, supervisors of Hempfield township, and the complaint will be dismissed as to them.

[3] Westmoreland Water Company states no reason for its failure to provide the service other than insufficient showing of assured revenue. No mention was made of lack of franchise rights or of absence of need of the service by complainants. The Commission, in respect to proposed extension of waterworks facilities and service, is of opinion that each extension must be reasonable when viewed in light of the circumstances surrounding it, not only with respect to the needs and requirements of the prospective consumers, but also with respect to any added burden that may be placed upon the utility as a whole, if such utility is ordered to extend its facilities.

The record indicates that about 100 prospective consumers are seeking public water supply service for domestic use and for fire protection, and that the present water supply, from cisterns and shallow wells, is unsanitary, not potable, and insufficient, and must, in certain instances, be hauled in containers from a distance.

Westmoreland Water Company, by its attorney, states: "We don't deny these people need service up there. I don't think it is necessary for counsel for the complainants to prove that service is needed. We admit it, or we wouldn't be willing to go up there for less than 4 per cent. The company is willing to make this extension if it is assured of anything like an adequate revenue."

The water company further states that the extension is estimated to cost $49,549, and includes the installation of 8-inch and 6-inch cast-iron mains, together with 2-inch cast-iron mains to supply side streets on which there would be no fire hydrants; the erection of a 100,000 gallon elevated tank at the end of the line; the installation of a booster pump; fire hydrants at various points along the mains; and installation of service lines and meters. Respondent also states that, if fire protection service is not included, there will be a reduction in the amount of the cost of eight fire hydrants, or $1,200.

The anticipated annual revenues are estimated by the company to total $2,314, as summarized in the following tabulation:

Domestic consumers—100 at $15	$1,500
Public fire protection—Jeannette	366
Public fire protection—Hempfield twp.	448
Total estimated annual revenue ..	$2,314

Respondent estimates additional operating expenses for rendering service in this territory at $1,605, based upon an allocation to this territory of operating expenses for its entire system. The company further estimates the immediate additional annual out-of-pocket expense it would incur in serving this territory at $622, which is stated to include maintenance, depreciation, purification of water, and pumping water at Lincoln Heights. The company further states that this sum does not include such elements of expense as commercial, collecting, supervision, and other expenses presently incurred in operating the company.

Based on the annual operating expenses of $1,605, the resulting annual income attributable to the sought-for extension would be an operating deficit of $105 for domestic consumption alone, an income of $343 for domestic consumption and fire protection in Hempfield township equivalent to a return of 0.69 per cent, or an income of $709 for domestic consumption and fire protection in both the township and in Jeannette equivalent to a return of 1.43 per cent on the estimated cost of the sought-for extension. Based on the out-of-pocket expense of $622, the annual income attributable to the sought-for extension on the three foregoing bases would be correspondingly $878, $1,326, and $1,692, equivalent to returns on the estimated cost of 1.81 per cent, 2.68 per cent, and 3.41 per cent, respectively.

The water company states that it is willing to make the expenditure required to render service in this territory on the basis of receiving revenues from domestic service and fire protection service from both Hempfield township and city of Jeannette, which revenues would total about $2,314.

Counsel for complainants read into the record excerpts from the water company's answer to the complaint, as follows:

"The territory covered by this complaint is located in the Lincoln Heights, and that the respondent believes that this territory will grow substantially in the immediate future.

"The respondent, believing that the residents of this district and the supervisors of the township would arrange to have fire service contracted for, installed the necessary facilities to carry its service under the Lincoln highway in advance of the paving of that highway, so that the company could render service to the residents of the township without disturbing the new concrete surface of the state highway, and that these facilities were installed during the year 1937.

"The respondent believes that the revenue presently available of $1,692.11 does not constitute a fair return on the property required to render service in the territory, but believes that in the event service is extended in accordance with its plans a fair return can be received by the company in a comparatively few years, and is willing, for that reason to make the required extension, if the revenue mentioned above be assured."

The township of Hempfield is a second-class township and its supervisors are authorized by law to contract with any private corporation for a supply of water for public uses. Two of the three supervisors of Hempfield township, in their testimony, expressed willingness to coöp-

erate in extending service into this area.

The city of Jeannette is similarly empowered by law to contract for providing public fire protection service. Although notified of the hearing in this proceeding, the city of Jeannette entered no appearance and we are, therefore, not advised of the city's attitude with respect to fire protection service from the proposed extension.

Reference to respondent's Exhibit No. 1 shows that virtually all of the presently prospective consumers are situated in Hempfield township, and that but four are situated in the city of Jeannette, although a portion of the mains is situated in the city for the purposes of connecting with the existing facilities of the water company and of extending to a suitable location for the proposed elevated tank. In view of these circumstances it would appear that there is now no impelling need of public fire protection service within the limits of the city from the proposed extension.

[4] We will not direct the water company in this instance to proceed with the construction of the additional facilities and to render water supply service in Lincoln Heights, if domestic consumption only is assumed, showing a deficit, based on all additional operating expenses, and a return on capital to be invested of 1.81 per cent, based on out-of-pocket expenses. On the other hand, the water company has indicated its willingness to extend its facilities and service if sufficient revenue could be anticipated to produce an income of $1,692, based on out-of-pocket expenses, which would be equivalent to a return on its estimated added investment in the extension and facilities of 3.41 per cent. According to the water company's statement, this is "not a good investment, but a reasonable investment."

As previously stated, a return of 2.68 per cent will be obtained if revenues from domestic service and fire protection service in the township only are considered. The difference between this return of 2.68 per cent and respondent's statement of reasonable return of 3.41 per cent is one of minor degree only, particularly in view of respondent's expectations that the "territory will grow substantially in the immediate future," and that a fair return can be expected to be received by the company in a comparatively few years. There is no indication that providing this extension and rendering the domestic service and public fire protection service in the township would place an undue burden upon the over-all operations of the water company or be detrimental to its consumers as a whole, therefore,

Now, to wit, May 8, 1939, it is *ordered:* That the instant complaint, in so far as it relates to the supervisors of Hempfield township, be and is hereby dismissed for lack of jurisdiction.

It is *further ordered:* That the instant complaint, in so far as it relates to Westmoreland Water Company, be and is hereby sustained.

It is *further ordered:* That Westmoreland Water Company, upon receipt, on or before July 15, 1939, of applications for public water supply service to complainants and others adjacent to the proposed extension, to the extent of at least one hundred applications, and of application from the board of supervisors of Hempfield

township for public fire protection service along the portion of the proposed extension in Lincoln Heights, shall forthwith proceed to extend its water distribution system, facilities, and service to such applicants.

It is *further ordered:* That Westmoreland Water Company, on July 15, 1939, serve upon complainants and file with the Commission a statement of the applications received in accordance with this order, or file and serve such statement prior to such date upon receipt of the required applications.

It is *further ordered:* That, within 120 days following receipt of the applications hereinbefore enumerated, Westmoreland Water Company shall construct and place in operation all of the facilities contemplated and required to render the sought-for service.

UNITED STATES SUPREME COURT

United States

v.

F. O. Morgan, Doing Business as F. O. Morgan Sheep Commission Company et al.

[No. 221.]

(— U. S. —, 83 L. ed. —, 59 S. Ct. 795.)

Appeal and review, § 70 — Remand in rate case — Further proceedings below.

1. The Secretary of Agriculture is left free to take such further proceedings as the statute permits after remand by the United States Supreme Court in a case where the Secretary's order reducing scheduled rates for services rendered at stockyard has been set aside on the ground that the Secretary failed to accord a full hearing as required by statute, p. 49.

Appeal and review, § 1 — Courts and administrative agencies — Related instrumentalities.

2. A reviewing court and an administrative agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other, in securing the plainly indicated objects of the statute setting up the agency and providing for judicial review of its action, p. 52.

Appeal and review, § 73 — Functions of court — Stay of rate order — Impounded funds.

3. A Federal district court reviewing an order of the Secretary of Agriculture establishing stockyard rates sits as a court of equity, and, in exerting its extraordinary powers to stay execution of the rate order and in directing payment into court of so much of the rate as has been found admin-

istratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles, p. 52.

Rates, § 12 — Powers of Secretary of Agriculture — Stockyard charges — Remanded case.

4. The Secretary of Agriculture, after remand by the Supreme Court of a case in which his rate order has been set aside as having been rendered without procedural due process, is free to make an order fixing rates for the future, and for that purpose or any other within the purview of the Packers and Stockyards Act he is free to determine a reasonable rate for the period antedating any order he may make, even assuming that in the reopened proceedings he may not promulgate a rate order as of the date of the earlier order or make an order for the payment of money paid into court for the purpose of making reparation, p. 52.

Reparation, § 9 — Powers of court — Impounded funds.

5. A court of equity which has in its custody impounded funds representing the difference between scheduled rates and lower rates ordered by the Secretary of Agriculture, in a case where his order has been set aside and remanded for failure to accord procedural due process, has authority and is under an equitable duty to dispose of such funds according to law and justice, p. 53.

Courts, § 1 — Equity court — Remedies — Public interest.

6. The extent to which a court of equity may grant or withhold its aid and the manner of moulding its remedies may be affected by the public interest involved, p. 54.

Reparation, § 45 — Impounded funds — Retention by court — Pending proceedings after remand.

7. A court of equity which has required payment into court of the difference between scheduled stockyard rates and lower rates ordered by the Secretary of Agriculture, in a case where the order had been set aside as having been rendered without procedural due process and the case had been remanded for further proceedings, should retain the fund until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him, p. 56.

(BUTLER, MCREYNOLDS, and ROBERTS, JJ., dissent.)

[May 15, 1939.]

APPEAL *from order of District Court providing for distribution to stockyard agencies of money paid into court pending the disposition of litigation over a rate order of the Secretary of Agriculture; reversed. See same case below, 24 F. Supp. 214.*

APPEARANCES: Solicitor General Jackson, of Washington, D. C., argued the cause on both the original argument and reargument for appellants; Frederick H. Wood, of New York city, argued the cause on both the original argument and reargument for appellees. John B. Gage, of

Kansas City, Missouri, argued the cause on reargument for appellees.

Mr. Justice STONE delivered the opinion of the court: On this appeal we are asked to determine the proper disposition to be made of a fund paid into the court below pending a suit instituted in that court to set aside an order of the Secretary of Agriculture reducing scheduled rates for services rendered at the Kansas City stockyards. The fund is made up of the difference between the scheduled rates and those prescribed by the Secretary's order, which was ultimately set aside by this court in Morgan v. United States (1938) 304 U. S. 1, 82 L. ed. 1129, 23 P.U.R.(N.S.) 339, 346, 58 S. Ct. 773, 999, without consideration of the merits, for failure of the Secretary to follow the procedure prescribed by the statute.

On June 14, 1933, the Secretary of Agriculture promulgated an order under the Packers and Stockyards Act [August 15] 1921, 42 Stat. at L. 159, Chap. 64, 7 USCA §§ 181–229, setting aside a schedule of maximum rates to be charged for stockyard services, filed by market agencies at the Kansas City stockyards, and prescribing a new and lower rate schedule for the future. In a suit brought in the district court for western Missouri by appellees, conducting market agencies at the Kansas City stockyards, to set aside the order as confiscatory and as having been rendered without procedural due process, the court on July 22, 1933, entered a temporary restraining order enjoining enforcement of the Secretary's order upon condition that appellees should: "deposit with the clerk of this court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the schedule of rates in effect exceeds the amount which would have been collected under the rates prescribed in the order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

[1] After two appeals we reversed the final decree of the district court, which had sustained the order of the Secretary. This court held that he had not accorded to appellees the "full hearing" which § 310 of the act requires, and, without considering the merits, it remanded the cause for further proceedings. Morgan v. United States (1936) 298 U. S. 468, 80 L. ed. 1288, 56 S. Ct. 906; 304 U. S. 1, 82 L. ed. 1129, 23 P.U.R.(N.S.) 339, 346, 58 S. Ct. 773, 999. A petition for rehearing, in part on the ground that the mandate of this court had made no provision for the distribution of the fund paid into the district court pursuant to its restraining order, was denied in a memorandum opinion stating that the questions raised were appropriately for the district court, to which the cause had been remanded for further proceedings. The opinion added:

"We remand the case to the district court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the district court in relation to any

such proceedings, are not matters which we should attempt to forecast or hypothetically to decide." 304 U. S. at pp. 23, 26, 23 P.U.R.(N.S.) at p. 349.

By this remand the Secretary was left free to take such further proceedings as the statute permits. Texas & P. R. Co. v. Interstate Commerce Commission (1896) 162 U. S. 197, 238, 239, 40 L. ed. 940, 954, 16 S. Ct. 666, 5 Inters. Com. Rep. 405; Southern R. Co. v. St. Louis Hay & Grain Co. (1909) 214 U. S. 297, 302, 53 L. ed. 1004, 1006, 29 S. Ct. 678; Florida v. United States (1934) 292 U. S. 1, 9, 78 L. ed. 1077, 1084, 4 P.U.R. (N.S.) 498, 54 S. Ct. 603.

The Secretary thereupon, by order of June 2, 1938, reopened the original proceedings which had resulted in the challenged order of June 14, 1933. He directed that the "Proceedings, Findings of Fact, Conclusion, and Order" of June 14, 1933, be served upon the appellee market agencies as his tentative findings and order, with an opportunity for appellees to file exceptions to them and to make oral argument upon the exceptions. This action was followed, June 11, 1938, by the present proceeding, begun by motion of appellants in the district court to stay further proceedings there and to direct the clerk of the court to retain the impounded funds until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by him. This motion was denied, and from the order of the district court granting a counter-motion by appellees to distribute the fund among them, the case comes here on appeal.[1] Section 316 of the Packers and Stockyards Act, 42 Stat. at L. 168, Chap. 64, 7 USCA § 217; [October 22, 1913], 38 Stat. at L. 209, 220, Chap. 32, 28 USCA §§ 47, 47 (a); § 238 (5) of the Judicial Code, 28 USCA § 345 (5). This court has stayed and superseded the order of the district court pending appeal. October 10, 1938.

The district court held that the fund should presently be distributed to appellees, both because the Secretary is without authority under the act to make any order prescribing rates and charges which will be effective as of June 14, 1933, the date of his original order, and because it construed the terms of its own restraining order as requiring distribution of the fund to appellees on the final determination by this court that the Secretary's order of June 14, 1933, was invalid. Thus, as a result of the litigation, the district court has twice sustained the determination of the Secretary that the rates prescribed by him, on the basis of voluminous evidence, were reasonable; but because of this court's decision that the Secretary had failed to observe the statutory requirement of a full hearing, we have never reviewed that determination. The question now arises whether upon a redetermination of that issue by the Secretary the district court will have, and

[1] On the same date the district court entered a decree on the mandate of this court setting aside the Secretary's order of June 14, 1933, and permanently enjoining its enforcement. In that decree the district court retained jurisdiction and decreed that "such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the registry of this court with the clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July, 1933, as to law and justice may appertain."

should exercise, the power to order distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined upon appropriate review of the Secretary's findings to be just and reasonable be returned to those who have paid them. This issue must be decided now, for unless the court will have such power there is no occasion to retain the fund pending further proceedings before the Secretary, and distribution of it must be made as the district court has directed.

Decision turns on the meaning and application of the provisions of the Packers and Stockyards Act, construed in the light of its dominant purpose to secure to patrons of the stockyards prescribed stockyards services at just and reasonable rates, and upon the authority and duty of the district court to effectuate that purpose in making disposition of the fund. Section 304 of the act requires every stockyard owner and market agency to furnish nondiscriminatory and reasonable stockyard services, and § 305 declares that "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful." Section 307 makes a like requirement as to regulations and practices in respect to furnishing stockyard services. Section 306 makes it the duty of stockyard owners and market agencies to file with the Secretary a schedule of rates for stockyard services and to charge and collect such rates, unless they are set aside by appropriate action of the Secretary or changed by the filing of new rates as authorized by the section. Section 308 (a) provides that any stockyard owner or market agency violating any of the previously mentioned sections shall be liable to the persons injured to the full extent of the damage sustained. Section 308 (b) provides for enforcement of such liability either by complaint to the Secretary or by suit in any district court, and concludes with the declaration that "this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Section 310 authorizes the Secretary "after full hearing" on complaint, or on his own initiative, to prescribe just and reasonable rates for the future.

Appellees insist that notwithstanding the command of § 305 that all rates shall be "just, reasonable, and nondiscriminatory," its mandate is effective only so far as implemented by the other sections of the act; that except in a reparation case the statute forbids the Secretary to make orders affecting completed transactions, and that acting on his own initiative, as he does here, he can fix rates for the future only. They point out that under § 309 (a) and (e) and § 310, any person aggrieved may, on petition to the Secretary, seek damages for the exaction of an unreasonable rate in the past, the naming of a new rate for the future, or both, but that when the Secretary institutes such proceedings on his own motion he is precluded by § 309 (c) from making any order for

the payment of money. As the original proceeding here and the action of the Secretary in reopening it were taken on his own motion, the conclusion is drawn that there can be no legal warrant for restitution of the impounded moneys to the patrons of the market agencies, even though the Secretary shall now determine, on evidence and by proper procedure, that the scheduled rates exceeded the reasonable rates prescribed by § 305.

Even though the premises be accepted as in all respects sound, the conclusion does not follow. There is here no question of the Secretary's making an order for the payment of money. The fund having been taken into custody of the court, in consequence of its order restraining the operation of the rate schedule prescribed by the Secretary, the questions for our decision are whether the district court, in the discharge of the duty which it has thus assumed as a court of equity, can rightly dispose of the fund without regard to the command of § 305 if the Secretary shall determine that the rates exacted by aid of the court, and paid into its registry, are excessive; and whether, in the exercise of its discretion, the court should retain the fund until such time as the Secretary, proceeding with due expedition, shall make his final determination and order.

[2, 3] In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice;[2] neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see Ford Motor Co. v. National Labor Relations Board (1939) 305 U. S. 364, 373, 83 L. ed. —, 59 S. Ct. 301; Inland Steel Co. v. United States (1939) — U. S. —, 83 L. ed. —, 59 S. Ct. 415; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles.

[4] Assuming, as appellees contend,

[2] See Year Books, 22 Edw. IV. Mich. pl. 21; Heath v. Rydley (1614) Cro. Jac. 335, 79 Eng. Reprint, 286; 1 Holdsworth, History of English Law, 459–465.

that after the Secretary's order of June, 1933, was set aside he could, in the reopened proceeding, neither promulgate a rate order as of that date nor make an order for the payment of money, he was still not without authority in the premises under the statute and the mandate of this court. He was free to make an order fixing rates for the future, and for that purpose or any other within the purview of the act he is now free to determine a reasonable rate for the period antedating any order he may now make. See Atlantic Coast Line R. Co. v. Florida (1935) 295 U. S. 301, 312, 79 L. ed. 1451, 1459, 55 S. Ct. 713. No prior decision of the Secretary stands in the way of his making the determination now. Cf. Arizona Grocery Co. v. Atchison, T. & S. F. R. Co. (1932) 284 U. S. 370, 76 L. ed. 348, 52 S. Ct. 183. The sole limitation upon his power, prescribed by § 309 (c), is that upon an inquiry instituted by him he may not order the payment of money. In other respects his power to investigate and decide is unaffected.[3] He may make inquiry "as to any matter or thing concerning which a complaint is authorized to be made" to him, "or concerning which any question may arise under any of the provisions" of the act, "or relating to the enforcement of any" provision. He is given "the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money." § 309 (c).

[5] That the Secretary, acting under § 309 (a), could now entertain a complaint by the patrons of appellees who have contributed to the fund in court charging that the rates exacted were in violation of § 305, seems to be conceded and is, we think, plain. Section 309 (a) specifically provides: "If . . . there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper." It seems equally plain that under § 309 (c) the Secretary, in the exercise of his discretion, may conduct such an investigation on his own motion. Ordinarily, it is true, there would be no occasion for such an investigation if, as a result of it, the Secretary could make no reparation order. But, as we shall presently point out, when the alleged excessive rates are in custodia legis, the court has authority and is under an equitable duty to dispose of them according to law and justice. Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his de-

[3] § 309(c): "The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money."

termination can afford a proper basis for the action of the district court in making disposition of the fund.

The district court, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, assumed the duty of making the proper disposition of the fund upon the termination of the litigation. The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests in the injunction and the final disposition of the fund affect. Inland Steel Co. v. United States, — U. S. —, 83 L. ed. —, 59 S. Ct. 415, *supra*.

[6] It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. Central Kentucky Nat. Gas Co. v. Kentucky R. Commission (1933) 290 U. S. 264, 271, 78 L. ed. 307, 312, 3 P.U.R.(N.S.) 384, 54 S. Ct. 154; Pennsylvania v. Williams (1935) 294 U. S. 176, 185, 79 L. ed. 841, 847, 55 S. Ct. 380, 96 A.L.R. 1166; Virginia R. Co. v. System Federation, R. E. D. (1937) 300 U. S. 515, 552 et seq., 81 L. ed. 789, 802, 57 S. Ct. 592. Congress having by the Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates, and equally so to direct it to the restitution of rates which it has taken into its own custody, once they are shown to have been unlawful. If such a determination had already been made by the Secretary in the proceeding before him, after full hearing, and if it were found by the district court to be supported by evidence, the duty of the court to make restitution forthwith would seem evident, notwithstanding the absence of any order of the Secretary directing the payment. Inland Steel Co. v. United States, *supra*.[4] The Secretary, as we have seen, is authorized to make the determination. Section 305 denounces unrea-

[4] In Inland Steel Co. v. United States (1939) — U. S. —, 83 L. ed. —, 59 S. Ct. 415, the Interstate Commerce Commission had ordered certain railroads to cease the payment to shippers, in conformity to a filed tariff, of switching charges which the Commission had found to be unlawful. On review of the action of the Commission the district court stayed the Commission's order and directed the railroads, pending final disposition of the

sonable rates as unlawful. The statute, as declared by § 308 (b), saves to the court authority to give any remedy which in the present circumstances it might otherwise afford.

This court went much further in Atlantic Coast Line R. Co. v. Florida, *supra,* in denying, on equitable grounds, restitution to shippers of the excess of an intrastate rate, prescribed by order of the Interstate Commerce Commission to avoid discrimination against interstate commerce, over that prescribed by the state Commission, where the order of the former was later set aside by this court for want of proper findings by the Commission. Upon further proceedings before the Commission it made a second order, upon proper findings of discrimination, establishing the rate as before. The final result of the litigation was that the railroads were permitted to collect and retain the higher rates for a period during which there was no lawful order of the Commission superseding the state commission rates. There, as here, the administrative agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. Ewell v. Daggs (1883) 108 U. S. 143, 148, 149, 27 L. ed. 682, 684, 2 S. Ct. 408; Weeks v. Bridgman (1895) 159 U. S. 541, 547, 40 L. ed. 253, 255, 16 S. Ct. 72; Toy Toy v. Hopkins (1909) 212 U. S. 542, 548, 53 L. ed. 644, 646, 29 S. Ct. 416. Though voidable, it could not be ignored without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action. Atlantic Coast Line R. Co. v. Florida, *supra* (295 U. S. 301, 312, 313, 317, 79 L. ed. 1451, 1459–1461, 55 S. Ct. 713); New York Edison Co. v. Maltbie (1935) 244 App. Div. 436, 8 P.U.R.(N.S.) 337, 279 N. Y. Supp. 949; Brooklyn Union Gas Co. v. Maltbie (1935) 245 App. Div. 74, 9 P.U.R.(N.S.) 153, 281 N. Y. Supp. 233.

It is said that the distinction be-

cause, to place further payments due under the tariff in a special fund to be held subject to the order of the court. The Commission's order was ultimately sustained, but meanwhile the Commission, pending review in the courts, had postponed the effective date of its order, so that during the litigation there was no operative Commission order forbidding the unlawful payments. This court rejected the contention of the shippers that the fund must be paid over to them because it was accumulated in the absence of a controlling order of the Commission. We held that it was the duty of the district court, resulting from its injunction and its control over the fund, to make equitable disposition of it, and we sustained the district court's order that the fund should be turned over to the railroads in conformity to the Commission's determination, confirmed on judicial review, that the switching allowances were unlawful.

tween this and the Atlantic Coast Line R. Co. Case is the distinction between judicial inaction and judicial action; that there the court, upon settled equitable principles, was free to refrain from compelling restitution if satisfied that no injustice had been done, see Tiffany v. Boatman's Sav. Inst. (1874) 18 Wall. 375, 385, 21 L. ed. 868, 870; Mississippi & M. R. Co. v. Cromwell (1876) 91 U. S. 643, 645, 23 L. ed. 367, 368; Deweese v. Reinhard (1897) 165 U. S. 386, 390, 41 L. ed. 757, 758, 17 S. Ct. 340, but that here the court is called on by appellants to act by withholding from appellees rates which are still lawfully in force because the filed schedule has not been set aside by a valid order of the Secretary. While at the moment appellants are content with inaction, and it is appellees who are demanding action—the payment to them of rates whose lawfulness is challenged and not yet determined—the actual posture of the case is such that the court is under a self-imposed duty to act by virtue of having taken the fund into its possession, and in acting to dispose of the fund it must conform to controlling legal principles. Reasonableness of the rates was not established by the filed schedules. Had the rates collected been paid to appellees instead of to the clerk of the court, the Secretary could have ordered reparation upon proper findings that they were unreasonable. And the question is whether the court must now, in the face of a proceeding by the Secretary to determine the reasonableness of the challenged rates, use its power to complete their collection at the risk of obstructing reparation, or whether it should itself remain inactive until their lawfulness is determined and then act accordingly.

[7] It is a power "inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." Arkadelphia Mill. Co. v. St. Louis S. W. R. Co. 249 U. S. 134, 146, 63 L. ed. 517, 525, P.U.R.1919C, 710, 39 S. Ct. 237. See Northwestern Fuel Co. v. Brock (1891) 139 U. S. 216, 219, 35 L. ed. 151, 153, 11 S. Ct. 523. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution. Northwestern Fuel Co. v. Brock, *supra;* Ex parte Lincoln Gas & E. L. Co. (1921) 257 U. S. 6, 66 L. ed. 101, 42 S. Ct. 2; Baltimore & O. R. Co. v. United States (1929) 279 U. S. 781, 73 L. ed. 954, 49 S. Ct. 492. And where by its injunction a court has compelled payment into its registry of amounts which may in pending proceedings be found not to have been due from those who paid them, we think justice equally requires the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. See New York Edison Co. v. Maltbie, *supra;* Brooklyn Union Gas Co. v. Maltbie, *supra;* cf. United States v. Klein (1938) 303 U. S. 276, 82 L. ed. 840, 58 S. Ct. 536.

A proceeding is now pending before the Secretary in which, as we have

seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. Atlantic Coast Line R. Co. v. Florida, *supra*, 295 U. S. at pp. 312, 313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him. Cf. Mahler v. Eby (1924) 264 U. S. 32, 68 L. ed. 549, 44 S. Ct. 283; Tod v. Waldman (1924) 266 U. S. 113, 69 L. ed. 195, 45 S. Ct. 85. The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly.

Reversed.

Mr. Justice Reed took no part in the consideration or decision of this case.

Mr. Justice BUTLER, dissenting: In proceedings instituted on complaint of shippers in 1922, the Secretary, July 27, 1923, approved a 15 per cent reduction of market agencies' charges. In May, 1932, the agencies filed tariffs, which were not challenged by shippers or suspended by the Secretary, making additional reductions of about 10 per cent. These rates remained in force until November 1, 1937. Then there became effective a new schedule established by agreement between the agencies and the Secretary. There being no question as to reasonableness of charges made since that date, the appellees were not required to continue making deposits to secure their compliance with the Secretary's order of June 14, 1933, challenged in this suit, and so impounding ceased.

The money on deposit in the district court is made up of amounts taken from charges as low as, or lower than, those so put and kept in force and applied until November 1, 1937. In the proceedings pending before him, the Secretary may not order reparation. (See § 309. Also Arizona Grocery Co. v. Atchison, T. & S. F. R. Co. (1932) 284 U. S. 370, 389, 76 L. ed. 348, 355, 52 S. Ct. 183) and is without jurisdiction to do more than prescribe charges to be applied after the effective date of that order if one shall be made. The challenged order having been adjudged invalid because made in violation of the act (Morgan v. United States (1938) 304 U. S. 1, 82 L. ed. 1129, 23 P.U.R. (N.S.) 339, 346, 58 S. Ct. 773, 999), the appellees immediately became entitled to the money that, in pursuance of the restraining order, was deposited in court by them to secure their compliance with the Secretary's order if found valid. The record contains nothing to support the idea that the

pledge was for any other purpose, or to justify or excuse withholding it for another use. For the reasons stated in its opinion, 24 F. Supp. 214, the district court rightly held appellees entitled to have their money returned to them. Its decree should be affirmed.

Mr. Justice McReynolds and Mr. Justice Roberts join in this opinion.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Samuel Grove

v.

Red Lion Water Company

[Complaint Docket No. 12618.]

Rates, § 270 — Flat or meter basis — Option.

Consumers of a water utility should have a right to elect meter rate service rather than flat rate service, where the utility reserves the right to elect that service to any consumer shall be on the meter rate basis.

[May 15, 1939.]

COMPLAINT *against action of water utility company in offering domestic service at flat rates only; complaint sustained and company ordered to make meter rates available to any consumer upon application.*

By the COMMISSION: Under date of November 5, 1938, Samuel Grove, a consumer of Red Lion Water Company, respondent, filed a complaint alleging that respondent ". . . is charging excessive flat rates for water service and is hereby asked as imposed by law (charges based only on amount consumed) to establish metered water service rates." At present, respondent offers domestic service at flat rates only. The complaint alleges that the flat rates are unreasonable and complainant prays that meter rate domestic service be made available. Counsel for complainant, in the following language, requests us to require respondent to make available to complainant and other domestic consumers either flat rate service or meter rate service at the option of the consumers:

"This complainant, Mr. Grove, made the complaint with the express purpose and desire that he be allowed to have his choice of being served with water on a meter rate schedule or a flat rate schedule, and he made that

complaint because citizens in his neighboring towns of Dallastown and Yoe . . . have that privilege in their communities, and Mr. Grove feels that the citizens of the borough of Red Lion should also be accorded the privilege of choosing as to whether or not they may have meter rates or flat rates."

Complainant lives alone in a modern home with 12 water outlets, and now pays $26.60 a year for flat rate water service, and claims that he does not use enough water to justify such a charge. When it was suggested that he did not need all 12 outlets, and that some of them could be closed off, thus lowering his bills, he said that he was willing to pay for the convenience they afforded, but objected to paying for water service he did not use. When it was pointed out that, even under meter rate service, he would have to pay a minimum charge, he said he understood that but still felt that with meter rate service his bills would be lower.

Six other consumers, all desiring service at meter rates, testified on complainant's behalf.

Complainant offered no evidence relating to the general allegation that the flat rates were excessive. On the other hand, respondent submitted balance sheets and income statements, which, though not conclusive, do not indicate that the revenues received from flat rate domestic service and meter rate commercial and industrial service have been excessive.

The only question now to be decided is: Should complainant and other domestic consumers of respondent have the right to elect to take meter rate service?

Respondent renders service to approximately 1,325 consumers at flat rates, and approximately 80 at meter rates. All of the water is pumped.

A petition of 188 consumers, involving 251 properties supplied with water by respondent, praying that respondent be ordered to make meter rate service available to domestic consumers, has been filed with the Commission.

Respondent expresses the opinion that meter rate service to domestic consumers generally would probably not result in ultimate savings to the consumers, contending that there would be considerable additional investment in the meters and that there also would be additional operating costs. Respondent goes further and contends that the consumers as a whole would be called upon to pay considerably more for meter rate service than they are now paying for flat rate service.

This Commission has held on other occasions that meter rates for services are more equitable to both the company and the consumer than flat rates. Furthermore, meter rates result in conservation of water and in decreased pumping costs. We are not greatly impressed with respondent's evidence relating to the installation and operating costs of large numbers of meters, particularly since, as pointed out by respondent, it is probable that for some of the consumers who signed the petition and for many of the other domestic consumers, meter rate service would result in bills which would be higher than for flat rate service, and thus would not be chosen by such consumers.

Respondent's Tariff Pa. P. U. C.

No. 5, effective January 1, 1938, includes a comprehensive schedule of flat rates and a schedule of meter rates. In the schedule of meter rates it is stated that meter rates are only available for commercial and industrial consumption. In Rule 14 of its rules and regulations, respondent reserves the right to place a meter in any connection through which water is being used in unnecessarily large quantities, or wasted, and to charge the published meter rate for water taken through the meter. Rule 15 provides that the cost of the meter and installation will be paid by the company.

In any instance where the utility reserves the right to elect that service to any consumer shall be on the meter rate basis, as in the instant case, it is just and reasonable that the consumer have the corresponding right to elect meter rate service. Consequently, we are of the opinion, that under the circumstances here present, any consumer of respondent should have the right to elect meter rate service; therefore,

Now, to wit, May 15, 1939, it is *ordered nisi:* That the complaint be and is hereby sustained, to the extent of the above findings.

It is *further ordered:* That respondent, Red Lion Water Company, file, post, and publish within thirty days after service hereof, a supplement to its tariff, effective upon ten days' notice to the public and to this Commission, making its meter rates available to any consumer, upon application for meter rate service.

It is *further ordered:* That this order nisi shall become final twenty days after service thereof upon respondent, unless exceptions are previously filed thereto, by either complainant or respondent.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Public Utility Commission

v.

Westmoreland Mining Company

[Complaint Docket No. 11657.]

Public utilities, § 41 — What constitutes — Electric service to tenants.

1. A corporation formed for the purpose of mining coal and owning and maintaining, on a portion of its property, a town of approximately 180 houses, substantially all of which are leased to its employees, renders public utility service when it furnishes electric current through its own facilities to its tenants through separate meters and charges them for such service, p. 61.

PUBLIC UTILITY COMMISSION v. WESTMORELAND MINING CO.

Public utilities, § 21 — Tests of status — Charter limitations.

2. A corporation formed for the purpose of mining coal is subject to regulation as a public utility when it furnishes public utility service, although such service is ultra vires because it is not provided for in the charter, p. 62.

Fines and penalties, § 8 — Mitigating circumstances — Question as to status.

3. No penalties were imposed upon an industrial corporation for furnishing public utility service without a certificate of convenience and necessity, in view of the corporation's coöperation with the Commission in having its status determined and in view of the existence of a reasonable question as to whether or not the service rendered was a public utility service, p. 62.

[May 15, 1939.]

INVESTIGATION *for purpose of determining whether an industrial corporation is rendering a public utility service in violation of the Public Utility Law; public utility status determined, continuance of service ordered, and compliance with provisions of law ordered.*

By the COMMISSION: The Commission on April 19, 1939, upon its own motion, instituted an inquiry and investigation for the purpose of determining whether or not respondent is rendering a public utility service to the public in violation of the Public Utility Law, and for the further purpose of determining whether or not penalties should be imposed. An answer was filed by the respondent and, after due notice, hearing was held in Pittsburgh.

There are no disputes as to the facts in the matter, but a question of law alone is raised.

[1] The facts of record are as follows: Respondent is a Pennsylvania corporation, formed for the purpose of mining coal, and has no provision in its charter authorizing it to engage in the furnishing of electric current to the public. Respondent owns and maintains, on a portion of its property, a town of approximately 180 houses, substantially all of which are leased to its employees. Respondent, from about 1920, has furnished electric current through its own facilities to its tenants, through separate meters, without having secured a certificate of public convenience. Respondent, at each pay period, deducts the amount charged for the electric current from each tenant's pay, which deduction is shown on the employee's pay envelope.

Respondent stated in its answer that it intended to discontinue service on and after January 1, 1939, and a similar notice was served on its tenants. At the hearing, counsel for respondent stated on the record that said service would be continued until the Commission issued its final order.

Article I, § 2 (17-a) (66 P. S. § 1102) of the Public Utility Law reads as follows:

" 'Public utility' means persons or corporations now or hereafter owning or operating in this commonwealth equipment, or facilities for:

"(a) Producing, generating, transmitting, distributing, or furnishing . . . electricity . . . for the production of light, heat, or power to or for the public for compensation; . . ."

Under § 2, *supra,* in order to sustain the character of public service, the utility service need not be one which is offered to the public indiscriminately. The service furnished by the respondent is offered to all those members of the public who can use that particular service, that is to all tenants of the respondent. In doing so the public is in fact served, and the business is affected with a public interest although the actual number of persons served is limited. Ambridge v. Public Service Commission, 108 Pa. Super. Ct. 298, P.U.R. 1933D, 298, 165 Atl. 47.

[2] Although the rendering of said service is "ultra vires," nevertheless, it is subject to regulation by the Commission. In determining whether a corporation is rendering service which is subject to regulation by the Commission, the important thing is what it does, not what its charter says. Pennsylvania Chautauqua v. Public Service Commission, 105 Pa. Super. Ct. 160, P.U.R.1932D, 145, 160 Atl. 225.

[3] In view of the fact that respondent has fully coöperated with the Commission in having its status determined, and that there was a reasonable question as to whether or not the service rendered was a public utility service, no penalties will be imposed.

Upon a full and adequate consideration of all the matters and things involved, we find and determine that Westmoreland Mining Company, respondent, is a public utility and that it is rendering a public utility service to the public in violation of the provisions of the Public Utility Law; therefore,

Now, to wit, May 15, 1939, it is *ordered:* That Westmoreland Mining Company, respondent, continue to furnish electric service to its tenants until such time as the Commission grants its approval for the abandonment of the same.

It is *further ordered:* That Westmoreland Mining Company, respondent, forthwith comply with the provisions of the Public Utility Law.

Re Michigan Associated Telephone Company

[T-552-39.3.]

Valuation, § 331 — Going value — Necessary proof.

1. No separate allowance is made for going value when no facts to support a claim for such value, as required under the law, are presented, p. 64.

Valuation, § 332 — Going value — Separate allowance.

2. No separate allowance for going concern is necessary when the basis of valuation reflects the actual cost of attaching business such as advertising, promotion, and training of personnel, p. 64.

[May 17, 1939.]

PETITION *for authority to file increased telephone rates; increased rates authorized.*

By the COMMISSION: A petition was filed February 20, 1939, by the Michigan Associated Telephone Company for authority to file increased rates applying to its Whitehall exchange and the matter was brought on and heard March 9, 1939.

From evidence and from the files and records relating to the petitioner in the above-mentioned matter the Commission finds:

1. That the petition intends, subject to the rate adjustment here proposed, to expend the sum of $97,849 for new plant and equipment in its Whitehall exchange principally for automatic dial type central office equipment to replace the present magneto type apparatus ($40,180), dial station equipment (telephones) to replace the present instruments ($25,171), cable necessary for the improvement ($19,233) and miscellaneous equipment and labor ($13,265).

2. That the petitioner's present undepreciated investment in telephone plant in service and in working capital and supplies in its Whitehall exchange is $119,000 approximately, of which investment $33,444 will presently be retired and charged to the petitioner's accrued depreciation reserve. The investment after the conversion to dial will become $183,438 (the present investment $114,483 less retirements of $33,444 plus the gross addition $97,849 plus an allowance of approximately $4,550 for working capital).

3. That according to the company's statement the present annual revenue collected at the Whitehall exchange is $15,455 approximately; that the proposed rate adjustment will produce approximately an additional $6,-

109 annually; that the annual revenue is estimated to be $21,564, approximately, after the rate revision.

4. That the present annual operating expenses of the Whitehall exchange before the provision for depreciation are $13,532 approximately; that the conversion to dial operation, it is estimated, will reduce these annual expenses at least $1,113; that the expected annual operating expenses before provision for depreciation after conversion to dial will be $12,419 approximately.

5. That the expected annual revenue after the proposed rate revision will produce a sum in excess of the annual operating expenses, before provision for depreciation, of approximately $9,145 which will represent the petitioner's income available for return and depreciation; that $9,145 represents less than 5 per cent of the petitioner's investment, undepreciated.

6. That having examined all the evidence before it and the records and files relating to the petitioner, upon the basis of foregoing findings and conclusions, the Commission is of the opinion that the rate increases proposed and agreed to by the petitioner's customers in Whitehall are necessary for the continued maintenance and rendition of adequate telephone service and would be in the public interest.

[1, 2] In all the foregoing findings, the Commission has made no separate allowance for going value for no facts to support the claim such as are required under the law were presented. Public Utilities Commission v. Michigan State Teleph. Co. (1924) 228 Mich. 658, P.U.R.1925C, 158, 200 N. W. 749. Further, when the basis of valuation reflects the actual cost of attaching business such as advertising, promotion, training of personnel, etc., no separate allowance for going concern is necessary. California R. Commission v. Pacific Gas & E. Co. (1938) 302 U. S. 388, 82 L. ed. 319, 21 P.U.R.(N.S.) 480, 58 S. Ct. 334; Denver Union Stock Yard Co. v. United States (1938) 304 U. S. 470, 82 L. ed. 1469, 24 P.U.R.(N.S.) 155, 58 S. Ct. 990; Los Angeles Gas & E. Co. v. California R. Commission, 289 U. S. 287, 77 L. ed. 1180, P.U.R.1933C, 229, 53 S. Ct. 637.

In all the foregoing findings, the Commission has allowed $5.68 per station for necessary working capital and material and supplies, which amount the petitioner represented as the actual amount as of December 31, 1938.

Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on personnel changes, recent and coming events.

Radio Schedule Part of "CP" Promotion Program

A THIRTEEN-WEEK, nationwide radio program of spot announcements to be broadcast from more than 100 key cities is included in plans for a Fall campaign promoting "CP" gas ranges to begin September 1st, according to an announcement by the Association of Gas Appliance and Equipment Manufacturers.

The range promotion radio messages, to be sponsored by sales outlets, will feature the "Save While You Cook" theme and will tie-in with the industry's national advertising schedule and respective local advertising efforts. October 2nd is the date set for the first radio announcement.

Plans for the Fall campaign of promotion, the third to be projected this year in behalf of "CP" gas ranges, center around getting local sales outlets conscious of the large gas range market made available by the approximately eight to nine million obsolete cooking appliances estimated as still in use in this country. Emphasis will be placed on the "Time Saving, Food Saving, and Fuel Saving" value of "CP" ranges which embody a required minimum of construction and performance features. There are now twenty-six manufacturers in the United States and Canada joined in the program to promote this latest of cooking appliances.

A Fall sales plan book, built around the "Save While You Cook" theme, will be mailed about August 1st to more than 20,000 utility executives and retail dealer outlets by the Association of Gas Appliance and Equipment Manufacturers. Distinctive in make-up, it will be six-sided with consecutively opening up pages fashioning into a large "flower shape."

Guy Wilson Named Manager G-E Transportation Dept.

GUY W. Wilson has been named manager of General Electric's transportation department according to a recent announcement by Charles E. Wilson, executive vice president of the company. Less than 30 days prior to that date Mr. Wilson had been made assistant manager of the same department.

In his new advancement Mr. Wilson succeeds E. P. Waller, manager of the department for the past 17 years, who now has been made an assistant to E. O. Shreve, vice president in charge of apparatus sales.

Construction Work Started by New Jersey Utility

CONSTRUCTION work has started on the initial step in a program of expansion at the Burlington generating station of the Public Service Electric & Gas Co., Newark, N. J. Ultimately the capacity of this station will be increased from the present 55,000 kw. to approximately 350,000 kw.

First step in the expansion program will cost $12,000,000. It will include installation of a 100,000-kw. generating unit and other equipment, designed in keeping with the modern trend in the generation of electricity by steam and employing the latest technological improvements known to the industry. Improved boiler design, higher steam temperatures and pressures, improved turbines, hydrogen-cooled generating units are among the features incorporated in the plans.

1940 Heating & Ventilating Exposition Plans Advancing

A TOTAL of 230 companies have engaged over two-thirds of the available exhibit space of the Sixth International Heating and Ventilating Exposition, to be held in Cleveland, January 22 to 26, 1940, according to a recent announcement. The Exposition will be held under the auspices of American Society of Heating and Ventilating Engineers.

Two additional members have just been appointed to the Exposition Advisory Committee of which Mr. J. F. McIntire is chairman. The new members include E. C. Webb, Stoker Manufacturers Association, and C. Merrill Barber, American Institute of Architects.

Scientific aspects of combustion in all its phases will be presented at 1940 Exposition. Combustion will be considered in terms of function, apparatus, and fuels, the latter including oil, gas, and coal. Equipment and accessories in this section include furnaces, burners, grates, stokers, refractories, boilers, gauges, etc. The related field of steam and hydraulic equipment will be represented by traps, driers, feeders, piping, hangers, fittings, heaters, pumps, valves, thermal insulation, and expansion joints.

Central heating will be represented by exhibits of apparatus and materials designed to provide economical heating and humidification for building areas of every type. Exhibits of refrigerating equipment in its relation to air conditioning will include compressors, condensers, cooling coils, circulating pumps, and refrigerants.

One of the most interesting sections of the Sixth International Heating and Ventilating Exposition will be devoted to machines and equipment used in the handling of air. Any project involving the cooling, heating, drying, moistening, cleaning or transfer of volumes of air requires an assortment of ingenious devices all of which will be on display. Included are fans, blowers, exhausters, humidification systems, filters, ducts, and cooling towers. Related to this field are such important items as unit heaters, unit coolers, ventilators, registers and grills.

Walker Electrical Co. Issues New Catalog

WALKER Electrical Company, Atlanta, Georgia, announces the release of a new catalog (No. 8) listing an extensive line of Socket Meter Troughs and Boxes for Indoor and Outdoor use. The listings include combinations with Service Switches and Circuit Breakers.

Copies may be secured direct from the manufacturer.

Potomac Elec. Pwr. Expansion Program Underway

EXPANSION of generating capacity and transmission facilities contemplated by Potomac Electric Power Co., Washington, D. C., in its $10,250,000 construction budget this year is progressing at a satisfactory pace.

The company plans purchases of a boiler delivering 525,000 lb. per hour and a slag-bottom furnace burning pulverized fuel, as well as a 41,000-sq. ft. condenser. The project will necessitate enlargement of the power house, construction of new cooling water intake tunnels and a screen house, as well as complete relocation of the coal-burning facilities.

In addition, work under way this year includes construction of about 20 miles of 33,000-volt underground transmission line and continuation of the change-over from d.c. to a.c. in downtown Washington.

A major element in the company's increasing load is the great growth in air-conditioning in Washington in recent years. So rapidly is the load growing that even with the present expansion the company expects to need additional power in 1942.

Style Note on Switchgear Offered by G-E

SWITCHGEAR is being offered in several new finishes such as light bronze, heavy bronze, and pearly gray according to an announcement by the General Electric Company. These colors are now listed in the company's literature as standard in addition to customary black.

Improved appearance of the station can be obtained by selecting switchgear in a complimentary color to harmonize with station design and decoration, and, it is pointed out, switchgear in colors other than black should tend to encourage better plant maintenance.

New Booklet Published by Barron G. Collier, Inc.

BARRON G. Collier, Inc., has recently issued a booklet composed entirely of letters from advertising agencies all over the country, expressing their opinion and telling of the results their clients obtained from transportation advertising.

Copies of this interesting booklet may be secured from Barron G. Collier, Inc., 745 Fifth Avenue, New York City.

To Push Electric Appliances

DETAILED plans for Fall advertising and promotion of electric ranges, heaters, roasters and refrigerators were announced recently by the Modern Kitchen Bureau.

Copy will emphasize that electric ranges are fast and economical. Theme of the campaign will be, "National Electric Range Exposition." "Time to Change" will be the slogan of the promotion for heaters. National advertising also is being planned for roasters and refrigerators.

Chevrolet Sales Increase

CHEVROLET new car and truck sales for the first 10 days of July totalled 18,498 units. This is a gain of 41.8 per cent over the same 10 days in 1938, according to a company announcement.

The Rate of Progress in Steam Generation

Progress in steam generation today differs from that of the past, not so much in essential character as in the rate at which the newer developments are introduced and adopted.

The 1200-pound-pressure boiler was a distinct innovation in 1922. Its adoption was looked upon as a great step to take, despite the preparatory research and experimental work that preceded its commercial application.

When direct-firing of pulverized coal was first advocated for large, high-capacity boilers, the proposal met with a marked attitude of caution. Its adoption was at first slow—even though the idea was so sound as to result in its becoming generally accepted a few years later.

History repeated itself in the case of the slag-tap furnace. In spite of active promotion of the idea, its field of application was at one time commonly thought to be greatly restricted—as contrasted with its present extensive use.

The welded boiler-drum—another decided innovation—was adopted much more quickly. The tempo of the times has begun to accelerate.

Today, all these pioneering developments are accepted as standard practice. They are looked upon as desirable and practical advances in the art. And the rate at which new developments are demanded by the changing times has increased enormously since the first 1200-pound-pressure boiler was installed.

Throughout this development period, while the pace was growing faster and faster, the two basic policies of this Company remained the same—to meet, and, if possible, anticipate the needs of those it serves—to merit the confidence of users of its products.

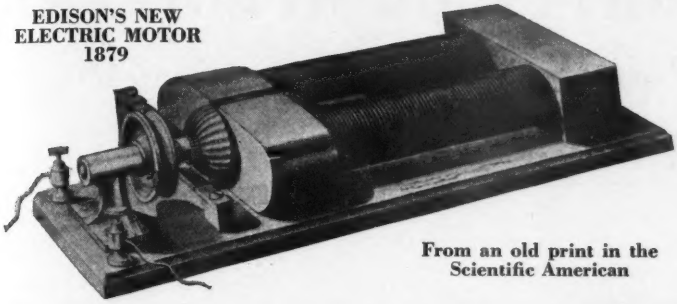
G-155

THE BABCOCK & WILCOX COMPANY
85 LIBERTY ST. NEW YORK, N. Y.

BABCOCK & WILCOX

The ELECTRIC MOTOR

EDISON'S NEW
ELECTRIC MOTOR
1879

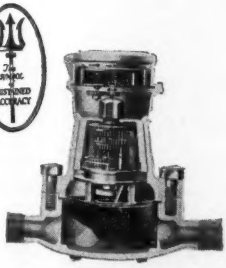


From an old print in the
Scientific American

. . . won and holds APPROVAL
because its principle was correct

The same holds true of the Disc principle in Water Meters

Edison's "new electric motor, intended to run sewing machines and other light machinery" survives today, its form altered, but its basic principle unchanged, because it was and is correct. So too the simple disc principle in Water Meters was and still is correct. It won and it holds the continual approval of the water works field. It is the principle utilized in Trident Water Meters . . . the water meters known the world over for unparalleled sensitivity, sustained accuracy, low maintenance cost. More than 5½ million Trident Meters alone made and sold, the great majority still in service, because Trident precision-built interchangeable parts eliminate obsolescence, protect against depreciation, economically renew the life of old Tridents even after a generation of service. A splendid buy in low cost water-revenue-production . . . yesterday, today, tomorrow.



PHANTOM VIEW
SPLIT CASE TYPE

● *Neptune Meter Company, 50 West 50th Street (Rockefeller Center), New York City. Branch Offices in Principal Cities. Neptune Meters, Ltd., 345 Sorauren Avenue, Toronto, Canada.*

SINCE 1892

Trident WATER METERS

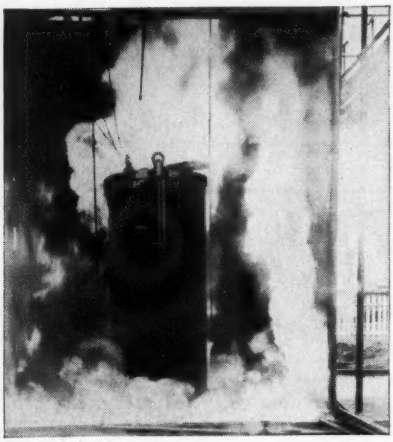
Utilizing the Disc Principle

HAVE HELD THE CONTINUAL

APPROVAL OF THE WATER WORKS FIELD

—GRINNELL MULSIFYRE—

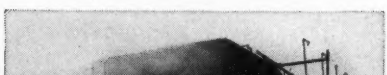
A Positive Protection Against Oil Fires



A stubborn transformer fire.

THE patented principle of Grinnell "Mulsifyre" System is the conversion of an inflammable liquid into one which cannot burn by the simple and effective method of emulsifying it. The necessary mechanical agitation to form the emlusion is provided by discharging water *alone*, with force, onto the surface of the oil by means of a special discharge nozzle, perfected by Grinnell, called a Projector.

Since its introduction, the "Mulsifyre" System has had wide acceptance in this country and abroad as an effective method of extinguishing oil fires. It has been approved for use in the bilges of oil burning ships of the United States Navy.



Five Seconds after water was turned on, "Mulsifyre" system has completely extinguished the fire.

Write for full details describing "Mulsifyre" and its applications. Grinnell Co., Inc., Executive Offices, Providence, R. I., Branch Offices in Principal Cities.

GRINNELL

AUTOMATIC SPRINKLER FIRE PROTECTION

"Give!"

says Government *and*

its "TAKE" exceeds the total income of the Western half of the United States—and the end is not yet.

IN 1938, the income of the darkened area of this map was $17,696,000,000.

But in 1938, Government, Federal, state and local, spent about $18,000,000,000.

That's more than the entire West realized from all the products of its year's work.

It equals nearly 30 cents of every dollar the nation's producers earned in 1938.

And what did it buy?

Well, for one thing it bought relief from distress for the needy. Everybody agrees to the rightness of doing that. But only one dollar out of six was spent for relief.

Most of the other increases in spending go for innovations in government service.

The last few years have seen the creation of 67 new Federal boards, commissions, administrations and authorities, agencies to supervise every activity of business from peanut-vending to steel production. Likewise, open and indirect competition with all business.

The question is *not* whether these are desirable government functions.

The question is whether the country wants expansion of government, which must be *paid for* by increased taxes—

Or wants expansion of business, which *pays* in jobs and wages.

For the increased money that now goes into government spending is the money that formerly went into new products, new factories, bigger payrolls. There isn't enough in the earned dollar to go both ways.

Less Taxes—More Jobs

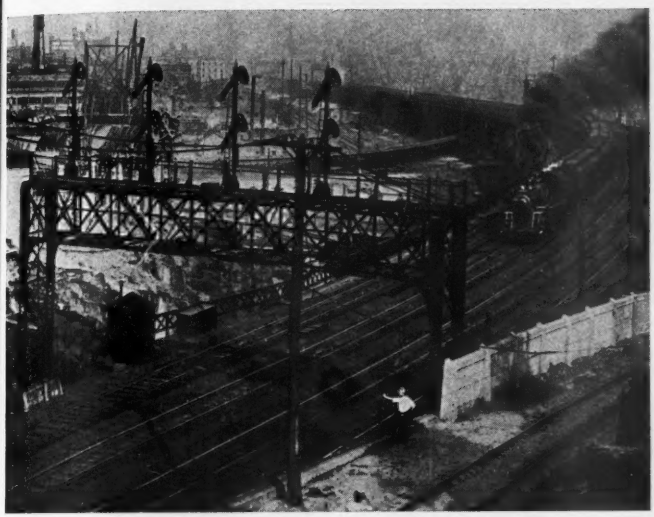
This message is published by

NATION'S BUSINESS

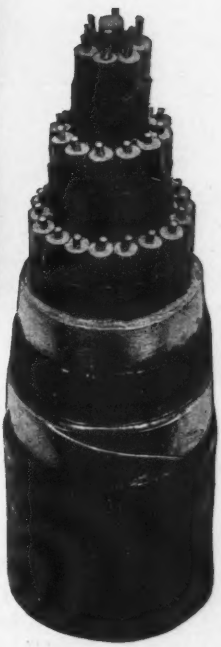
—a monthly magazine edited in Washington, where business and politics meet. Established 1912. 315,000 business men and women subscribe. Begin reading Nation's Business now.

CRESCENT

INSULATED WIRE AND CABLE



ADEQUATE WIRING SERVES AND SAVES



Railroads Use It!

To give added safety to their greatest slogan, "SAFETY FIRST", many of the country's great railroads give CRESCENT Wire and Cable the "right of way."

In our Multi-conductor Railway Signal Cables, you'll find every feature of toughness and durability that makes for long life under severest duty —exposed to the weather or buried underground.

CRESCENT INSULATED WIRE & CABLE CO. INC. TRENTON, NEW JERSEY

All types of Building Wire and all kinds of Special Cables to meet A.S.T.M., A.R.A., I.P.C.E.A., N.E.M.A., and all Railroad, Government and Utility Companies' Specifications.

RUBBER POWER CABLE
SERVICE ENTRANCE CABLE
SIGNAL CABLE
VARNISHED CAMBRIC CABLE
WEATHERPROOF WIRE
CONTROL CABLE
DROP CABLE
LEAD COVERED CABLE
MAGNET WIRE
PARKWAY CABLE

PROFESSIONAL DIRECTORY

• These pages are reserved for engineers, accountants, rate experts and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, design and construction. « « « « «

PROFESSIONAL DIRECTORY (*concluded*)

INDEX TO ADVERTISERS

[The Fortnightly lists below the advertisers in this issue for ready reference. Their products and services cover a wide range of utility needs.]

*Fortnightly advertisers not in this issue.

Better PRODUCTS . . .

because CITIES SERVICE knows your problems!

CITIES Service engineers, backed by 77 years of practical lubrication experience, are concentrating their efforts daily on solving the various lubrication problems with which industry is faced.

Wherever moving surfaces come together, no matter what the speed or load, Cities Service can recommend authoritatively the correct lubricants to use. Whether you need heavy greases for massive gears or the lightest of oils for delicate precision machines, Cities Service is ready to fill your every need.

Cities Service engineers will be glad to discuss your lubrication problems with you.

◆ ◆ ◆ ◆ ◆

CITIES SERVICE INDUSTRIAL OILS

Compressor Oils
Cutting Oils
Diesel Engine Oils
Cylinder Oils
Star Ice Machine Oils
Leather Finishing Oils
Loom Oils
Marine Engine Oils
Quenching and Tempering Oils
Sewing Machine Oils
Spindle Oils
Transformer Oil
Turbine Oils
Wool Oils

Hour of Stars—the Cities Service Concert—with Lucille Manners, Ross Graham and Frank Black's Orchestra and Singers—broadcast every Friday evening over the N.B.C. Red Network.

"HERE'S HOW IT WOULD LOOK

TODAY the task of encouraging a wider use of arterial and highway lighting is much simpler than it was just a few years ago.

For today we can support our claims about *arterial* lighting with pages from experiences in Detroit, Hartford, Syracuse, and other cities. Right now, *highway* lighting's claim of saving lives is being proved along the White Horse Pike in New Jersey, and along the approaches to Easton, Pennsylvania, and Lynn, Massachusetts.

A few years ago, lighting sales had to be pioneered. There were no statistics available for examination, no installations to be viewed. However, even then we could show the advantages of proper lighting. The tiny street and the two miniature highways (above) did that important j actually showed "how it would look."

Experiments with these models hel too, in finding how to get more and m of the light from the unit overhead d onto the pavement—and without g We made lighting better, and there more attractive, and more useful.

Opening new fields for the profitable of electric service is a large part of work—past and present—of General E tric. For we recognize the duty not to discover and perfect, but to prom This activity, reflected in an increa demand for your services, is include the return you receive when you purc equipment from General Electric.

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